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OF

CASES IN LAW AND EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF GEORGIA,

AT MILLEDGEVILLE,

PARTS OF DECEMBER TERM, 1868, AND JUNE TERM, 1869.

VOLUME XXXVIII.

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Law School

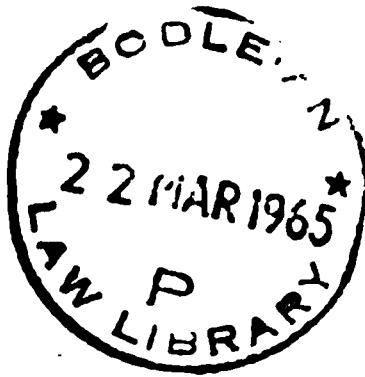
By N. J. HAMMOND, Reporter.

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 HON. IVERSON L. HARRIS, MILLEDGEVILLE.
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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT MILLEDGEVILLE,

JUNE TERM, 1868.

Present—HIRAM WARNER, *Chief Justice.*

IVERSON L. HARRIS,
DAWSON A. WALKER, } *Judges.*

JOHN S. CLEMENTS, plaintiff in error, *vs.* ELIZABETH BOSTWICK and JAMES MORROW, administrator of C. D. Bostwick, deceased, defendants in error.

When the husband of a married woman died seized and possessed of a tract of land, having the legal title thereto, the widow is entitled, under the provisions of the Code, to her dower therein; and the vendor's equitable lien for part of the unpaid purchase money, which was not enforced during the lifetime of the husband, will not override or defeat the widow's legal right to her dower in the land.

HARRIS, J. dissenting.

Equity. Injunction. Decided by Judge VASON. Calhoun Superior Court. November Adjourned Term, 1867.

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Clements *vs.* Bostwick, and Morrow, adm'r.

to pay \$8,870 00 in cotton, at nine cents per pound. Of amount, \$2,217 00 was payable on the 15th of December, 1862, and \$2,218 00 on the 15th of December, 1863, bearing interest from the first of January, 1862.

Clements took no security, but relied upon his vendor's lien. Bostwick failed to pay the two amounts last named according to his promise, and on the days when this cotton was due it was worth thirty cents per pound. In 1863 Bostwick died intestate, seized of said plantation. His wife, Elizabeth Bostwick, survived him. Morrow administered on his estate. The widow applied for an assignment of dower, and commissioners were appointed by the Court, and were proceeding to administer her dower out of said plantation.

Bostwick's estate is insolvent and insufficient to pay the debt of the dignity of promissory notes and of higher dignity. Who are the creditors, and what is the dignity of the several claims, is unknown to Clements. The administrator denies that Clements has any lien on the plantation, and contends that, if he has, the claim of the widow to dower is paramount to it.

For these reasons Clements filed his bill to discover the claims against the estate, and prayed that the widow be enjoined from taking dower out of said premises, and that he, Clements, should have his vendor's lien thereon, to the exclusion of her dower and of the other creditors.

The Chancellor ordered the defendants to shew cause why the injunction should not be granted. Upon demurrer and argument had, Judge Vason refused the injunction, holding that the bill was insufficient, in not charging notice on the creditors of Bostwick, and because the vendor's lien was paramount to the widow's right to dower. This Clements assigned as error.

STROZIER, BOWER, for plaintiff in error.

LYON & DEGRAFFENRIED, for defendants in error.

WARNER, C. J.

The main question presented by the record in this case for our consideration, and judgment, is, whether the widow of Bostwick is entitled to dower in the land sold and conveyed by Clements to Bostwick in his lifetime, to the exclusion of the vendor's lien upon the land for that portion of the purchase money which was unpaid at the time of Bostwick's death. By the 1753 section of the Code, dower is declared to be, the right of a wife to an estate-for-life in one-third of the lands according to valuation, including the dwelling house, (which is not to be valued unless in a town or city,) of which *the husband was seized and possessed at the time of his death*, or to which the husband obtained title in right of his wife. To entitle the widow to dower in the land of her deceased husband, she must prove a lawful marriage, the death of her husband, and that he was lawfully seized and possessed of the land, *at the time of his death*. The marriage of the parties, the death of the husband, and his seizin of the land at the time of his death is not denied, nor controverted. But it is insisted, that this *legal* estate of the wife, intended by the common law, as well as by our own Code, for the sustenance of the wife, and the nurture and education of the younger children, should be made *subordinate* to the latent equity of the vendor's lien for the unpaid purchase money for the land sold and conveyed to the deceased husband.

That the widow has the *legal* title to her dower in the land, there can be no doubt. Shall the latent equity of the vendor's lien for the unpaid purchase money of the land, which was not enforced during the lifetime of the husband, be allowed to override, and defeat the *legal* title of the wife to her dower in the land, after the death of her husband? The vendor of the land might have retained the title in his own hands until the purchase money was paid, but if he conveyed the legal title to Bostwick, relying upon his vendor's lien for his security for the purchase money, he took the *risk* of the legal consequences which would result in

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case of the death of Bostwick, and if he failed to enforce his vendor's lien during his life, he cannot reasonably complain of the effect and operation of the public law, which gives to the widow her dower in the land conveyed by him to his deceased husband. It may have been, that the vendor did not contemplate the death of his vendee before the purchase money for the land was paid, when he conveyed the legal title to the land to him, but that cannot effect the widow's *legal* right to dower in the lands of which her husband was *seized and possessed at the time of his death*.

After a careful examination of the provisions of the Code we think it was manifestly the intention of the Legislature that the widow's *legal* right to dower in the lands of her deceased husband, should be superior to *all liens*—and especially to the secret vendor's lien. By the 1759th section of the Code it is declared, that “no lien created by the husband in his life-time, though assented to by the wife, shall in any manner interfere with her right to dower.” So when the widow elects to take a sum of money in lieu of her dower in her deceased husband's land, it is declared, that the amount awarded by the commissioners appointed to assign her dower “shall be paid in preference to *all other claims* out of the proceeds of the sale of the land.” Code, section 1761. In the judgment of the majority of the Court, the widow's *legal* right to dower in the land mentioned in the record, must prevail over the *equitable* claim of the vendor's lien which is attempted to be enforced after the death of the husband. Let the judgment of the Court below be affirmed.

WALKER, J., concurred, but wrote out no opinion.

HARRIS, J., dissenting.

At December Term, 1867, of this Court, a case from Hancock, *Devereux and another*, was before it, in which the right of a widow to an actual assignment of dower in the lands of her deceased insolvent husband, *unaffected* by a judgment which had been obtained against him before his marriage, was affirmed.

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I dissented from the decision of my associates, but having omitted to file an opinion then, I avail myself of the occasion presented at this term, in which the widow's right to an assignment of dower has been held as paramount to the vendor's lien on the land or its proceeds, for *the unpaid purchase money*, to present an outline of the views which have led me to differ so widely from my colleagues as to the nature of dower and the transcendent right which they assert belongs to the widow under our laws.

Whilst at this time, by the Code, no such thing as a vendor's lien is recognized in Georgia, it is to be borne in mind that the case in the record originated before the repeal referred to, and is therefore to be decided on the principles controlling courts of equity before that repeal.

The grounds, as I understand my associates, upon which they have predicated their judgment, are the following:

1st. That Lord Bacon and Lord Coke tell us that *magna charta* favors three things, "life, liberty and dower."

2d. That by the Act of 1768, Cobb's Digest, 63, the widow was not barred of dower or right to it in mortgaged lands, unless she legally relinquished her right.

3d. That by the Act of 1826, she was entitled to dower in all lands of which the husband died *seized and possessed*.

4th. That she cannot be dispossessed of the mansion house.

5th. That by the Act of 1842, as a sheriff's sale made during the life of the husband barred dower in the lands sold, as effectually as if the land had been sold by the husband, this furnishes a *clear intimation*, that if the sale be *not made in the life of the husband*, her right to dower is not barred.

6th. That no lien created by the husband, though assented to by the wife, shall interfere with her right to dower.

7th. That as by paragraph of the Code 1761, the widow's right to the proceeds of the sale of the land, when she elects money, rather than assignment of her third of the land as dower, is *in preference to all claims whatever*, on the money so elected, the paramount right of the widow to an assignment of dower in all cases, free from incumbrances and liens, is distinctly established.

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I concede, at once, that the right of a widow to dower in the lands of which the husband died seized and possessed is beyond all dispute, and that her right thereto is not *barred* by anything but by her adultery, or elopement with an adulterer, or by a jointure made before or upon marriage, in *lieu* of all claims to dower, should she survive the husband.

I do not contest the abstract right of a widow to dower. I deny the proposition my associates have affirmed by their judgment, that the widow's right to an actual assignment of dower is paramount to all liens on, and incumbrances existing over, the land when the husband died, and that she is entitled to her third, *unaffected by them*.

The position I occupy is entirely consistent with the fullest recognition of a right to dower.

I have enumerated the Statutes of Georgia which my associates have relied on to sustain their judgment—they have collected, with assiduity, everything which they thought would help to thicken the proofs they have adduced, and which “do demonstrate thereby.”

Separately considered or in mass, I can but think that they furnish no proof whatever of the correctness of the judgment they have made—a judgment which stands on no correct principle, and is indefensible by any argument, as it shocks, by its injustice and absurdity, the reason of every well organized mind.

The proposition asserted can be defended only in those States where, in advance of the acquisition of landed property by the husband, the laws have so enacted, thus enabling creditors, and all others contracting with husband, to know what they will have to encounter upon his death. Such laws, it is understood, exist in North Carolina, Indiana, and, perhaps, Arkansas; and the decisions in these States are in conformity to their laws. But in *Georgia*, no such law exists as these, declaring the right of widow to an actual assignment of dower as *paramount to debts and incumbrances*. I propose to make a running comment on the several statutes referred to; as also the case in *10th Georgia*, 435.

Whatever may be the provisions of *magna charta* as to

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ver, and the opinions of Lord Bacon and Lord Coke as to favoring it, we can derive no aid whatever from any of them in the elucidation of the question discussed. Estimated at their full value, when pressed into a more than doubtful service, they can be useful only as rubble to crowd between the walls to give to the structure the *appearance* of solidity. To pass the reference to them without other remark than that they furnish a far better theme for a school-boy's declamation, than a place in the opinion of grave judges, interpreting antique laws made long since they were uttered.

The clause in the Statute of 1768 cannot have the slightest influence on the point discussed. As, at that time, it was necessary in cases of *alienation of land* by the husband, that the wife should join with him in order to bar dower therein, the Legislature, as it had been a matter of doubt, enacted that in cases of mortgages by the husband, the wife should not be barred of dower in the lands so mortgaged, except upon a release or relinquishment by her, as in the case of absolute conveyance by the husband. But the Act of 1826 changed these provisions, by restricting the right to dower to such lands as the wife brought into the marriage relation, and the lands of which her husband died seized and possessed.

It has been said that the Act of 1842, (pamphlet 75,) amending the Act of 1826, declaring conveyances made by sheriff during the life of the husband, in pursuance of sales by him under execution, should bar the right of widow to dower in lands so sold, furnishes a clear intimation that if the sale was not made by a sheriff during the life of the husband, the right of the widow to dower is not barred.

Grant that the right to dower exists in the unsold lands of which the husband died seized and possessed, the question arises, does not that right exist subordinate to the liens and encumbrances which fettered the property in the hands of the husband. The opinion, of my associates is, then, not aided by the Statute of 1842.

This enactment was wholly unnecessary, for, from the Act of 1826, it would have followed as a direct consequence that the widow could not have dower in lands sold by the sheriff.

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of which the husband had been legally disseized and dispossessed. I comment on it only because the attempt is made to give it a strained and illegitimate significance. I take it to be undeniable, that no right to dower in lands sold by the husband during coverture, or in lands sold under the judgment or decree of a court, during the life of the husband exists in the widow; that in the land of the husband, bound by judgments obtained in his lifetime, but not enforced by execution, in mortgaged lands, and in lands unpaid for, and subject to vendor's equity, *the widow has a right to dower*, but it is a right subject to the qualification that she takes her dower affected by all the liens and incumbrances by which the lands were affected at the death of her husband.

The 1759th paragraph of the Code declares that no lien created by the husband, though assented to by the wife, shall in any manner interfere with her right to dower. The lien not being a sale or alienation of the land absolutely, the husband dying seized and possessed, the right of the widow to dower in it is not questioned, but in this, as in reference to judgment liens, where the right to dower also exists after the death of the husband, such right is subordinate to such liens, and she takes her dower subject to them. The plain meaning of this paragraph is, that although she assent during coverture to liens created by the husband on his lands, yet, should he die seized and possessed of the lands on which he had created liens, the widow should not be deprived of her right to dower in such lands, although she assented to such liens at the time.

But the main argument upon which my associates have relied, they have endeavored to derive from paragraph 1761 of the Code, which allows a widow, entitled to dower, to elect from the proceeds of the land of her deceased husband, the executor or administrator assenting to such election, and the ordinary approving it, an amount of money out of such proceeds which the commissioners appointed to assign her dower may estimate as its equivalent, which amount shall be paid to her *in preference to all claims whatever*.

Would it not have been extremely strange and unjust to

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have allowed that amount of money, the equivalent and purchase money of her dower in the land sold unincumbered by her right to an assignment of dower in it, to have been taken away from her? Her right to dower had been established. It was unaffected by incumbrances. The assent of executor or administrator, and the approval of ordinary, demonstrates that they had protected the rights of creditors and other heirs. In such case, why should it not be paid to her, in preference to all claims whatever. It was her money, or rather her dower, in the form of money. And from this paragraph, directing the money allowed as equivalent for the dower she surrendered to be paid to her in preference to all claims upon it, my associates say that *her right to dower, in all cases, is paramount to all debts, liens and incumbrances whatever.* This is *stretching* a principle very far. It can be justified only on the same ground on which Steele defended Dryden. Dryden had prostituted his muse so far as to compare the notorious Dutchess of Cleveland to Cato. The wit vindicated the poet by saying *that there was no stretching a metaphor too far when a lady was in the case.*

There seems to run throughout the decisions of the majority the idea that dower was a lien, or debt, or exemption, or homestead, and that upon the death of the husband, it was to be enforced by the courts, without regard to incumbrances or debts hanging over the estate of the husband. I can but think that, if the character of dower had been kept distinctly in view, it would have been impossible, logically, to have reached the conclusions which have been announced as law. Dower is simply an *estate-for-life* in lands of which the husband died seized and possessed. It is nothing else. In every respect it is like the life-estates, subject to the same incidents, and has no feature appertaining to it so as to treat it as a lien, or debt, or exemption, or homestead. It is an *estate-for-life*, created by positive law, for the benefit of the wife, and is made independent of the *will* of the husband, and is incapable of being defeated by *him*, should he die seized and possessed of lands.

A right to dower can only be *barred* by her misconduct

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whilst a wife, as by her adultery, or by a suitable provision for her by jointure, and then only with her assent that such jointure should be in lieu of all right to dower. The right to dower exists in all cases where the husband dies seized and possessed of lands, whether solvent or insolvent; and as it is an estate-for-life, carved out of the fee simple of which he died seized and possessed, like the fee simple, it, of necessity, must be subject to the same incumbrances and liens which have attached to and bound the greater estate. A law of nature forbids a stream to rise higher than its fountain head, a law of nature also, that of common sense, revolts at the idea that the widow does get a better title as to her share than that held by the husband in the same lands.

I take it that no principle of law is more generally assented to in our American system of jurisprudence, and with acquiescence which indicates that such assent springs from an instructive sense of undoubted justice and right, than that *all the property* of a decedent is first liable to the payment of his debts before any distribution can be made among his heirs. Subject to a few exceptions arising from humanity and supposed public policy, the principle stated controls and governs all property. The exceptions by positive law, in this State include the *paraphernalia* of the wife and children's clothing, furniture, food, so many acres of land, according to the number of minor children, the widow's quarantine in a mansion house of deceased husband, and now, by a recent Act, a large amount of real and personal property is set apart as a homestead, not to be subject to judgments obtained for debts contracted after such enactment. Of these laws I remark only will be made. No creditor can complain of such exemptions from liability to pay debts, if the credit was given after the exemptions were made. The proposition then, which I maintain is, that all of the *remainder* of the property of a decedent is subject to the payment of the incumbrances and liens hanging over or binding it and the debts generally, of the husband. These debts and liens are to be paid, in an order prescribed by law, for the guidance of executors and administrators.

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The oath of office which the representatives of estates take before entering on administration, requires *the payment of debts* in the order prescribed, before making any division of the estate among the heirs. This oath is a demonstration of the general principle asserted of the liability of all property to pay debts, *unless exempted*.

How comes it, then, that as dower, as has been already shown, is not an *exemption* or a homestead, or that it is not within any class not subject to levy, (and it certainly has not been enumerated,) and is neither a lien on the estate or a debt due by it, but is *an estate-for-life* in lands—a part of the lands which belonged to the husband at his death, and a continuation of his estate after his death—affected, as it was in his hands, by incumbrances, liens, debts, that such *an estate* shall not be liable to pay his debts, and to those liens and incumbrances, as well as the fee simple estate out of which it was carved? Dower can have no existence whilst the husband lives. The widow is made by law an heir to her dead husband, her *right* to the share the law has given her begins with his death. The law says she shall have a right to dower in one-third of the husband's lands. By this, she acquires precisely the same amount and quality of title to the one-third of the lands which she inherits from the husband, that the husband had in the whole, no more. If no more, and the title of the husband was, in any wise, incumbered, hers must also be. It is, says Kent, a general rule that dower can only be *commensurate* with the estate of the husband.

This rule involves, of necessity, the qualification that if the estate in land, held by the husband, is on condition or incumbered, the right to dower in such estate not being denied, when the dower is assigned, the dowress takes her third, subject to those conditions and incumbrances. And whilst such terms are imposed, equity will assist her in removing all impediments to the enjoyment of her estate. She must do equity. She will be required, by an apportionment, to remove such incumbrances to the extent of the value of her estate, if so much shall be necessary as her fair share.

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In 4th Kent's Com., p. 50, it is stated, as a general principle, that dower is liable to be defeated by every subsisting claim or incumbrances in law or equity, existing at the inception of the husband's title.

If, then, the seizin of the husband is thus effected by claims and incumbrances, and dower be but a continuation of the estate of the husband, it is beyond my capacity to comprehend how the doweress can take any other estate in the lands of the husband than he had at his death.

The principle stated by Kent is constantly enforced in courts of equity. Thus, when life-estates are considered there, and are charged with an incumbrance, the tenant-for-life is required to keep down the interest out of the rents and profits of his estate, where the security is payable at a distant day. In such case, the tenant-for-life is not bound to extinguish the whole security by payment; but he must remove the incumbrance in order to enjoy his life-estate, though he will be reimbursed the principal of the incumbrance paid by him out of the heir or remainder-man.

Dower being a life-estate, upon what principle is it to be exempt from the incidents that attach to the class of estates to which it belongs? The case in the record has arisen upon a bill filed by the vendor of land to a deceased husband, to prevent an assignment of dower to the widow until the purchase money is paid, or the wife does equity by removing the lien as to that portion of land which is assigned her as dower.

We must not forget we are in a court of equity. In such court, the strict legal right to dower, which a court of law might probably sanction, is always held subordinate to the implied lien of the vendor. That this is so, is evident from the fact that the vendee is treated as the trustee of the land for the vendor, until the purchase money is paid, and as the widow is no *bona fide* purchaser without notice, but claims through vendee, as heir, to the extent of the title she derives from her husband, she, by succession, is made a trustee for the vendor. This lien is, strictly speaking, simply an equity. But it is undeniably an incumbrance. Its origin is in a deep sense of natural justice and the presumed agreement of the par-

to the contract. Hence a court of equity, revolting at the justice of a purchaser enjoying fully property without the payment of a consideration, imposes terms on him and those coming by inheritance from him, and this constitutes what is called the vendor's lien. So, too, acting upon similar principles, it will not regard the actual seizin and possession of the husband, as in trust-estates in land held by the husband. Upon strict Common Law rules, the widow would be entitled to dower; but as the husband had no beneficial ownership in the lands held in trust, a court of equity denies her a right to dower. In cases of mortgages made of land by her husband, where condition is broken, she will be restricted, at his death, to dower only in the equity of redemption.

We again broadly admit that the widow has a right to dower in all lands of which the husband died seized and possessed; the question is not as to the abstract right, but whether she has a right to an actual assignment of dower, and to be in possession of the lands, unaffected by the liens, or encumbrances over the lands, whilst they were her husband's; in other words, whether her estate is paramount to liens, encumbrances and debts?

Let us test this. The husband, A, purchases the land in which the widow claims dower of B, against whom C held at the time an unsatisfied judgment for an amount larger than the value of the land. B dies insolvent. I take it, no one doubts that the land in A's possession was liable to pay the judgment held against B. But A dies without that judgment having been enforced against the land he purchased of B. C uses his execution to be levied on the land after A's death. The widow clearly has a right to dower in this land, but is not entitled to an assignment of one-third as her dower, to the prejudice of the execution creditor, in selling the whole of the land to satisfy his judgment? Certainly not. For, as A has left the land bound by the judgment in favor of C, the death of A does not defeat the lien of the judgment, but simply, in the distribution of the assets amongst creditors, postpones the payment until funeral expenses are paid, as also taxes, expenses of administration and debts due by A, as trustee.

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There is no postponement of the judgment creditor to the claim of dower. The law has not so said. Her right to dower exists, subject to the incumbrance of the judgment lien.

Is it not absurd to hold, in the case put, that A's widow had a right to an actual assignment of one-third of the land and to an absolute and unmolested enjoyment of it during her life, and that C, the creditor of B, must suspend the levy of his execution on the third of the land *until the widow of A should die*? That is to say, indefinitely, as the *vitality* of a widow defies the powers of arithmetic.

Such is a result which must ensue if the position of my associates be not abandoned. If it be true that the widow is entitled to an actual assignment of dower, unaffected by any lien or incumbrances, how does it happen that, although the husband holds by an absolute deed on its face, and has possession of the land, yet, because he gave simultaneously a mortgage on the land to secure the payment of the purchase money, that his widow is not entitled to dower, unaffected by the mortgage, in the land? Upon the reasoning of my associates she would clearly be entitled to such assignment. I say, too, she has a right to an assignment of dower in the land, subject to the incumbrance of the mortgage. My associates, seeing the monstrous injustice of allowing her dower until the mortgage was satisfied, are constrained to hold with me. Consistency required them to hold otherwise. In thus holding, they are maintaining a position that is right, and if it is right in the case put, why should it not be held in all cases where there are incumbrances or liens? But the vendor's lien being an *equitable* mortgage on the land, to secure the unpaid purchase money, on what principle is it that a distinction is made between it and a *legal* mortgage? If the legal mortgage is an incumbrance to the full enjoyment of dower, so, too, must be the equitable mortgage.

The inconsistencies characterizing the opinions of my associates as to the right of widow to an actual assignment of dower, have arisen from construing the terms "seized and possessed" *strictly*, without reference to their modification by equity.

It cannot but excite inquiry why the words seized and possessed are used in the Act of 1826. That they are not synonymous, is inferrable from their being used conjunctively. Seizin has reference to an unconditional, unincumbered title in the husband, and thus interpreted, all difficulty can be avoided as to the assignment of dower.

With this interpretation of its meaning, the distribution of the property of a decedent becomes simple, and the representative of the estate can move on in the administration of the estate without embarrassment, by first paying the debts in the order prescribed by law, and *then* making partition amongst the heirs of the land remaining *after* having had the widow's dower assigned. I repeat it, dower is *an estate-for-life*, in lands of which the husband died *seized and possessed*. The *power* of the husband to dispose of his lands by will to whomsoever he pleased, was limited by the Legislature in this only. A right in the widow to dower, was *conferred* by the Legislature, because it saw how very often it had happened that when the bloom of youth had faded, the wife ceased to have any hold on the affections or justice of the husband, that she was often thrown penniless on the world. Not so, however, did he treat his children. It trusted, as to them, to that deep-seated paternal feeling which exists, in full strength, in every uncorrupted heart, satisfied that provision would be made by the father for them if they had deserved it, and hence, it wisely declined to interfere with him in the disposition of his property amongst them. Not so, however, as to the wife. Satiety had produced indifference to her in the husband, or age had caused alienation of his regard, and it stepped in to protect her against such changes in the fickle affections of one to whose memory of the past it was unsafe to trust, and declared *the right of the widow to dower*. The law made the widow *an heir* to the husband, and fixed the *quantity* she *should inherit* in the land.

It put the widow on the footing of heirship with the children, and this is confirmed by law in that enactment which

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allows her to elect dower, (the life-estate,) or a child's *part absolutely*.

Should she elect a child's part, and all the land was necessary to pay the debts of the estate, would not her share have to bear the loss as well as the shares of the children? What reason, then, in the name of common sense, exists to exempt the estate of dower—an estate in the same lands—from liability to pay the debts? I think it must be evident, from bestowing attention upon the *order* of payment of the debts of a decedent, that the Legislature never for a moment regarded dower as a *lien*, or that, from its nature—it being simply an estate-for-life in land—it was entitled to any *place whatever* in the scale of priorities thus prescribed. Regarding the right of dower as a right to an estate-for-life in lands of which the husband died seized and possessed, a fixed and certain estate, if, after removal of incumbrances and liens, and payment of debts, any land was left out of which it could be assigned, it could have no place among the debts, and is therefore not mentioned. If the decision of the majority, that the widow has a right to an actual assignment and enjoyment of the estate of dower, paramount to all incumbrances, liens, and debts, be correct, an inevitable result from this will be that it takes precedence of the payment of funeral expenses, expenses of administration, taxes and debts due the public, and debts due by decedent as executor, administrator, guardian or trustee. My associates are driven by an inexorable logic to place dower above these; but they shrink from legitimate conclusions, and place it *after them* in the order of payment, and *before* mortgages, judgments, etc. This was done by my associates in the *Devereaux* case, where they subordinated the lien of a judgment to the right to dower unaffected by that judgment. That extraordinary decision carved out a niche between numbers four and five, in the order of debts to be paid, into which they have put dower, as being entitled by its consanguinity. If, indeed, our laws had said that the right to an assignment of dower should be unaffected by judgments or liens, and only subordinate to the classes of debts enumerated before judgments, then my associates would

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been right in the selection of the place into which to dower—not as a debt, but as an *estate*, not liable to pay it of some debts.

It occurs to me that if, by law, my associates had the right to place in the order in which debts are to be paid, the right of dower—as they have done—they had an equal right to place it at the head, and make the right of sepulchre give way to it, *and leave* the dead husband uncoffined and unburied. Our statutes are entirely silent. They give precedence to dower *over debts of any description, much more over incumbrances and liens on the land itself*. They have treated dower as property, out of which it might be necessary to pay the debts of decedent; but if not, then they gave *that estate* to be enjoyed by the widow, *before* the child or heir. *This is all that the law did*. The majority here, *have altered* this, by judicial construction, and, in my opinion, marred the symmetry of our system, and produced anomalies which reason can neither explain nor defend.

I conclude by saying that, for many years, I have witnessed, with uneasiness, the quixotism which the Bench displays whenever a woman is a party, or a woman's claims are involved. I fear that it is an *INCURABLE insanity*, as thus far has exhibited no obedience to law, and is deaf to reason, and even *insensible to ridicule*.

I record my dissent to the two judgments of my associates; the one made at December Term, 1867, the other at June Term, 1868, in the hope that the views which I have presented may weaken, if not destroy, their force as *authorities* hereafter, in the decision of other cases.

Mims *et al.*, vs. West.

WADE H. MIMS *et al.*, plaintiffs in error, vs. PHILLIP V.
defendant in error.

1. A *bona fide* purchaser, for value of a negotiable promissory before due, has a right to collect the amount thereof, notwithstanding the maker had been served with a summons of garnishment, requiring him to answer what he was indebted to the payee, who was the owner of it at the time of the service of the summons. In such a case the rights of the purchaser are paramount to those of the garnishee creditor.
2. The doctrine of *lis pendens* does not apply to negotiable securities not due.

Equity. Garnishment. By Judge VASON. Chancery.
Lee county. November, 1867.

On the 24th of June, 1867, West brought complaint in the Lee Superior Court, on an open account, against Wade H. Mims for \$2,519 95, and sued out process of garnishment which was served on Henry Green, James M. Sullivan and others. At the time of the service of such summons, all of the said garnishees were indebted in some way to Mims. After the service of the garnishments, Mims sold Sullivan's note to Henry T. Mash. Sullivan conveyed his property to Gilbert in trust, to pay his debts, and died without answering the garnishment, and now Mash is trying to get Gilbert to pay the Sullivan note. Gilbert took said trust after he learned that Sullivan had been garnisheed. Mims also transferred his notes on Montgomery and Green after they were garnished, and they paid them to the purchaser. And since the garnishment was served, Mims, for a small consideration, transferred Jackson's note to Robert T. Bird, who is trying to collect the same. Under this state of facts, West contended that the service of the summons of garnishment fixed the status of the said parties, and of the said claims at the dates of service, and any change of such *status* since, was illegal and void as against him, and by his bill he invoked the judgment of the Chancellor to that effect; and because Montgomery and Green were insolvent, and were disposing of their property to avoid paying said notes, he prayed that the sheriff of

county should take possession of their property, and hold it till they gave security for its forthcoming to answer their decree. He further prayed that Mash and Gilbert should appear and answer, and in fine, that complainant should have all the rights that he would have had, had the garnishees all answered his garnishments, and had there been no transfers of property, or of choses in action, and that, meanwhile, all further changes be enjoined. There was no allegation that the purchasers had any notice of the garnishments before they bought the notes.

Judge Vason sanctioned the bill, and ordered the sheriff to take possession of the property of Montgomery and Green, which they had mortgaged to Mims, and hold it till further order, unless they gave bond in the sum of \$1,000 00, for the forthcoming of the same, to pay any judgment which West might get against them by reason of the premises.

None of the defendants answered the bill except Bird. He said he bought the note before due, in due course of trade, for a fair and full consideration, without notice of the garnishment—and further, that he was no party to the order requiring said cotton turned over to an officer of the Court to abide its judgment, (this order does not appear in the record,) and knew nothing of it till after it was passed. His answer was supported by an affidavit of one Ansley, who saw him have said note before it was -due.

Bird moved to dissolve the injunction because there was no equity in the bill, and so far as he was concerned, because he had sworn off the equity, if there was any. The motion was refused, and this is assigned as error.

HAWKINS, KIMBROUGH, ANSLEY, (represented by McCAY,) for plaintiffs in error.

F. H. WEST, for defendant in error.

WALKER, J.

1. When a person is served with a summons of garnishment, he is required to answer what he was indebted to the defendant at the time of the service of said garnishment, Rev. Code, sec. 3226; and if unable to admit or deny his indebtedness, he should plainly and distinctly set forth the facts, so as to enable the court to give judgment thereon. *Ib.*, sec. 3492. Judgment should not be entered up against the garnishee, unless it appear affirmatively, that, at the time of the garnishment, the defendant had a cause of action against him for the recovery of a legal debt, due or to become due by efflux of time; and no judgment should be entered against the garnishee unless it would be available as a defence against any action afterwards brought against him, on the debt in respect of which he is charged. Drake on Att., sections 461, 583. The garnishee cannot be compelled to pay the debt twice. *Brannon vs. Noble*, 8 Ga., 550.

Under the old law, it would seem that a debt not due, was not subject to garnishment. In *Dalton vs. Solly*, Croke, Eliz., 184, "It was held *per Curiam*, that a foreign attachment can not be of a debt before it be due; and therefore, whereas one was indebted in a sum of money to be paid at Michaelmas, and it was attached before Michaelmas, but the judgment of the attachment was not till after Michaelmas, it was clearly held to be void, because it was not due when attached." This was decided in 1590. This rule seems to have been changed in Georgia; see *Glanton vs. Griggs*, 5 Ga. R., 424; *King & Ells vs. Carhart Brothers & Co.*, 18 Ga. R., 650; and probably in most of the States of this Union; see 6 Maine R., 263; 4 Mass. R., 235; 17 Pa. R., 440; 1 Har. & J. R., 536, (Md.); 3 Murphy's R., 256, (N. C.); 1 Ala. R., 396; 17 Arkansas R., 492. Mr. Drake, in his work on Attachments, sec. 587, states correctly the principles which now govern in relation to negotiable securities not due. He says: "As a general rule, the maker of a negotiable note should not be charged as garnishee of the payee under an attachment served before the maturity of the note, *unless it*

be affirmatively shown that before the rendition of the judgment, the note had become due, and was then still the property of the payee." Again, in sec. 585, he says: "But though the garnishee should answer that the defendant, at the time of the garnishment, was the owner of the garnishee's note not then due, no judgment should be rendered against him, because his obligation is not to pay to any particular person, but to the holder at maturity, whosoever it may be. Can the garnishee, or the defendant, or the court say that the defendant will be the holder of the note at maturity? Certainly not; and yet to give judgment against the garnishee, necessarily assumes that he will be." No judgment should be rendered against the garnishee unless it will, when satisfied, protect him against a subsequent suit to recover the same debt. Under the Rev. Code, sec. 2732, the paper which Bird purchased from Mims on Jackson, was a negotiable promissory note. He purchased for value, before the note fell due, and without notice of the garnishment. What are his rights under this state of facts? The Code, sec. 2743, says: "The *bona fide* holder for value of a negotiable instrument, who receives the same before it is due, and without notice of any defect or defence, shall be protected from any defence set up by the maker, except *non est factum*, gambling or immoral or illegal consideration, or fraud in its procurement." And in sec. 2597, it is said: "The *bona fide* purchaser of a negotiable paper not dishonored, or of money, or bank bills, or other recognized currency, will be protected in his title, though the seller had none." Here, it will be seen that negotiable paper, not dishonored, is placed on the same footing as money currency. The defences which may be set up against such a paper, are specifically named; and in none of them are the rights of the garnishee embraced, provided he should have to pay to the creditor.

In this case, suppose Jackson were adjudged liable to pay the amount of this note, under the summons of garnishment, and the bill making Bird a party had not been filed; when Bird shall sue Jackson on the note, can he set up a defence that the money had been forced out of him

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by a creditor of Mimms, and thereby defeat a recovery by Bird? If so, the effect would be to repeal sec. 2743; for that section, says Bird, shall be protected against such a defence as this. The *bona fide* purchaser of a negotiable instrument not due, stands in a great measure independent of the former holder. The law disconnects him with the previous title, and takes him into its own charge, as deriving a right from itself. See Cowan & Hill's Notes to 1 Phil. Ev, vol. 1 of Notes, p. 668, note 481.

The doctrine which we now lay down has been indirectly asserted by this Court. In *Glanton vs. Griggs*, 5 Ga. R. 436, this Court says: "It being thus made to appear that Glanton had express notice of the attachment lien, he can not disconnect himself from the previous title of Whatley. * * But for this proof, having traded for the note before due, he would have been independent of the former holder, who transferred to him the note. * * As it is, he took the note *cum onere*, nor is his claim paramount to that of the attaching creditor."

It was insisted that the case of *King & Ells vs. Carhart Brothers & Co.*, 18 Ga., R., 650, is an authority in favor of the garnishing creditor in this case. That case decides that "debts secured by negotiable instruments may be the subject of garnishment." We have no complaint to make with this principle; it is right. The point here made is as between the rights of the garnishing creditor and the *bona fide* purchaser, before due, of a negotiable paper. No such question was made in that case; and even if it had been, the code has been adopted since that time, (1855,) and according to its provisions, the rights of the purchaser are paramount to those of the garnishing creditor. See, also, *Murray vs. Sylburn*, 2 J. C. R., 444.

2. It was insisted that the doctrine of *lis pendens* should affect the purchaser, and operate as constructive notice to all the world, that the creditor was proceeding to enforce his rights against the effects of his debtor, and that the service of the summons of garnishment on the maker of the note impounded the funds in his hands, so that a transfer of the

note could not defeat the claim of the creditor. There is some force in this suggestion, but we think, looking to the policy of our Legislature in favor of negotiable paper, that the better rule will be to hold that the rights of the purchaser are superior to those of the garnishing creditor. We have not been able to find many decided cases touching this question. We find one very well considered case in 22 Ala. R., 760, Winston vs. Westfeldt. In that case, an injunction was granted, restraining the negotiation of a promissory note. The defendant, in violation of the injunction, transferred the note, for value, before due, to a *bona fide* purchaser, and the question was, whether the purchaser or the complainant in the bill had the better title to the money due on the note. The case was ably argued and well considered by the court, and the principle enunciated in the case is, that "the doctrine of *lis pendens* does not apply to negotiable paper. An injunction in force against the negotiation of a note does not destroy the negotiability, nor defeat the title of a *bona fide* purchaser, acquired pending the injunction, but without notice. This, certainly, is a stronger case than the service of a summons of garnishment.

Perhaps it may be well to repeat that we fully recognize the doctrine that negotiable instruments may be the subject of garnishment; but before judgment should be entered against the garnishee, it should affirmatively appear that the instrument is due, and belonged to the defendant subsequent to the time of the service of the summons, and to the time it fell due. These facts appearing, judgment may be safely entered against the garnishee, for a satisfaction of the judgment rendered upon this state of facts, will be a protection to the garnishee against a second payment of the debt. The court should not permit a judgment to go unless such facts appear as will make the satisfaction of the judgment a protection to the garnishee.

In this case, Bird, having purchased the Jackson note when it fell due, and paid a valuable consideration for it, without any notice of the garnishment, got a good title to it, which is not, in any manner, affected by the process

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of garnishment. As to him, the Court should have dissolved the injunction, the equity of the bill having been fully sworn off. The rights of the other parties can be passed upon when the facts are made manifest by the answers and proof. Judgment reversed.

FLORENCE REID, by her next friend, plaintiff in error, vs.
ALEXANDER R. REID *et al.*, defendants in error. .

The exercise of the discretion of a Chancellor in refusing to appoint a Receiver, will not be controlled except when it is abused.

Equity. Bill for injunction and appointment of a Receiver. Decided by Judge VASON. Chambers. Dougherty county. January, 1868.

Crawford M. Mayo, as *prochein ami* for Florence Reid, filed a bill against Alexander R. Reid, containing the following charges: Florence was the infant daughter of Alexander R. Reid and his wife, Mollie S. V. Reid, daughter of Benj. O. Keaton. On the first day of January, 1860, Keaton, in consideration of his love for Mrs. Reid and Florence, and in order to make suitable provision for the education and maintenance of the children of Mrs. Reid, and for the support and maintenance of herself for life, conveyed to said A. R. Reid certain land, mules, horses, cattle, hogs, etc., and plantation-tools and implements, to have and to hold the same for the sole and separate use of Mrs. Reid, and for the maintenance and education of her children, and at her death, to vest in said children, and A. R. Reid took the same, with the promise that he would carry out such trust, giving a written receipt therefor, a copy of which is exhibited.

For like purposes, and subject to the same trusts, Keaton gave A. R. Reid other personal property. Mrs. Reid died, leaving no child but Florence, who is six years old. A. R. Reid has squandered all of the personalty last given but two

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es, has rented out the farm to Wm. J. Reid for fifteen
 s of cotton, five of which had been paid to him and
 ped away; is a man of dissolute habits, negligent of his
 ness, wasteful in the use of money, and wholly unfit, by
 iation and habits, to take care of said property, which
 ngs to said Florence, or of her person. Benjamin O. Kea-
 is in life, and is made a defendant to this bill. The
 er is that he be restrained from conveying said land, that
 . J. be enjoined from paying any more rent to A. R.
 l, and that A. R. Reid be enjoined from collecting any
 e rent, from disposing of, or changing, the *status* of any
 aid property, that he be dismissed from his trust, and
 her trustee be appointed, and that, meanwhile, a Receiver
 ppointed to take charge of, and hold, said property sub-
 to the order of the Court.

The receipt exhibited is as follows:

GEORGIA, DOUGHERTY COUNTY.

the following negroes, to-wit: * * * * *,
 also the plantation known as the Burrill Hill Place, in this county,
 aining six hundred and twenty-five acres, agreeable to survey, in the
 district, valued at \$7,800, which I receive in trust for my wife,
 lie S. V. Reid, and agree to hold the same for her as a portion given
 er by her father, B. O. Keaton, as a part of her portion of his estate
 er his will, and which I am to hold in trust for her, as his will directs,
 which is to be considered as a portion of said estate to my wife.
 ary 1st, 1860.

ALEX'R R. REID.

Witness—F. O. WELSH.

A. J. MACCARTHY, J. P.

udge Vason granted the injunction, and ordered cause
 why a Receiver should not be appointed.

Reid answered the bill. He denied that he received
 property upon any other or different terms than that
 in said receipt, and claimed that upon the death
 the property was his own. Of Keaton's will
 nothing when he took the property. He denied
 mismanaged the property, and alleged that, on
 y, he had added his own capital to it, had
 entire attention to its management, and had man-

Reid vs. Reid.

aged it well, as he would show by the exhibited showing the workings of the farm since 1860. He said that he was sober, economical and thrifty; that he is taking good care of his daughter, having her in a minister's family, where her education and morals will be cared for, and that so far from squandering the property, out of only three bales of cotton received from Wm. J. Reid, as rent for said farm, and for \$225 00, he had sent his daughter \$123 00, to her schooling, board, etc., and expended the balance on the farm. He insisted that the bill was not at the instance of his daughter, but was brought by Mayo, who disliked her. Before this answer was filed, a demurrer had been filed. The grounds of demurrer were, that the bill contained no averment that it showed a parol trust with a life-estate and remainder, which estate could not be so made, that under the bill, if the defendant had been in possession of said property for more than seven years, exercising exclusive dominion over the same, and the same belonged to him as heir of his wife, and that the parol gift made an absolute estate in the heirs of Wm. J. Reid (at her death) free from any trust.

The consideration of this demurrer and of the appointment of a Receiver and dissolution of said injunction were before the Chancellor, and in addition to the foregoing, the Court had various *ex parte* affidavits, *pro* and *con*, presented, and read.

The will of B. O. Keaton was read. In it there was no allusion to Mrs. Reid, nor any general gift to her, which could affect her, but it contained gifts to other children of Keaton and a bequest to his daughter Rebecca on certain trusts therein named. And it was accompanied by an affidavit by Keaton, stating substantially that he intended to give to Reid's wife said property on the same trust as Rebecca held her property in the will, and that Reid agreed to accept it on those terms, and gave said receipt to carry out that intention.

John F. Cargile, James W. Mayo, James J. Mayo and Faircloth made affidavit that Reid was careless in the management of property, reckless in the expenditure of money,

and dissolute in his habits, and in their opinions unfit to manage property, and further, that they knew his general character which was bad, and that from that character they would not believe him on oath. On the other hand, F. O. Welch, John Murphy, Wm. J. Reid, F. Lippitt, B. Smith and H. M. Campbell made affidavit that Reid was a sober, industrious and economical man, not disposed to dissipation or extravagance, or loose or careless in the expenditure of money or property; that they had always and still did regard him as a man of sobriety and good moral character and habits, and they have reason to believe he is ordinarily prudent in his expenditures, and a very good manager of his property and means.

After argument, the Chancellor overruled the demurrer, refused to appoint a Receiver, and dissolved the injunction. The plaintiff in error assigns the refusal of a Receiver and the dissolution of the injunction as error, and in the same bill of exceptions the defendant in error complains of overruling said demurrer.

WRIGHT & WARREN, for plaintiff in error.

MORGAN & HARRIS, for defendant in error.

HARRIS, J.

The bill filed alleged that the grand-father of Florence Reid, in order to make provision for the mother of said Florence, and said Florence gave to respondent, *in trust for her*, land mules, etc., a life-estate in Mrs. Reid in said property, and at her death the property to vest in her children; that Mrs. Reid died, leaving but one child, the complainant, and that defendant took upon him said trust, and promised to carry it into effect. The bill alleged that defendant received the property from Benjamin O. Keaton, the grand-father of complainant, and gave a receipt in writing therefor, a copy of which is appended, as an exhibit, to the bill. Mismanagement of trustee was alleged, *bad character*, etc., and

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appointment of a Receiver asked, to take charge of the property in controversy and prevent waste.

To the bill thus framed, a general demurrer was filed by the defendant. Upon argument below, the demurrer was overruled. Judge Walker and myself affirm that judgment. As the allegations of the bill were admitted by the defendant to be true, we cannot perceive how, a trust for complainant being alleged and admitted, a demurrer could be sustained. Judge Warner places his dissent from us upon the ground that the receipt appended shows no trust for the complainant in the property given by Keaton. Whether there be an actual or implied trust for complainant, cannot be ascertained until the answer and other proofs in the cause shall have been heard before a jury. To it, under the charge of the Court, we remit that question. I am persuaded that there is an ambiguity in the receipt which requires explanation, and which the Code allows to be removed by parol testimony.

The receipt acknowledges the trust for his wife, Mrs. Mary A. Reid, (mother of complainant,) and defendant agrees to hold the property for her "*as Keaton's will directs.*"

The paper prepared by Keaton (who is still alive) is called *his will*, and referred to in Reid's receipt, when examined will be found to make no mention whatever of his daughter, Mrs. Reid or her daughter, but devises the bulk of his property by separate paragraphs, to his sons and to his daughter, her share under certain limitations and restrictions.

The question, then, under the receipt, is whether Keaton's gift to Reid did not both have reference to the limitations of the latter devise—Keaton giving to Mrs. Reid as he gave to his other daughter, and Reid receiving the property under like restrictions.

If this was the donor's purpose—as the receipt is clear and unambiguous—there is now no technical rule to prevent Reid from shewing what was intended. I am sensible of the fact that it has been adjudicated that a remainder cannot be established by parol testimony, but when Keaton shall have been heard as a witness and the reference in Reid's receipt—to holding the property "*as Keaton's will directs*"—fully

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explained by him, very probably all the difficulties which would embarrass at law can be readily surmounted in a court of equity, especially when dealing with a trustee.

We all unite in affirming that portion of the judgment below in which the Judge refused to take the property out of the possession of Reid and place it in the hands of a Receiver. The testimony as to Reid's habits and character was conflicting—but after weighing it, and refusing the prayer of the complainant, we will not interfere with the exercise of a discretion which is not shewn to have been abused.

Judgment affirmed.

GEORGE W. COLLINS, plaintiff in error, vs. JOHN RUTHERFORD and STEPHEN COLLINS, defendants in error.

- 1 A Justice of the Inferior Court, on the 26th day of October, 1867, had authority, under the law, to administer an oath for the removal of intruders upon land.
- 2 The counter-affidavit of the party in possession must state that he does, in good faith, claim a *legal* right to the possession of the land.
- 3 When the affidavit of the party in possession is dismissed for not being in compliance with the law, he will not be permitted to file a second affidavit at the court, the Code requiring that he shall *at once* tender to the sheriff the proper affidavit.

Warrant against intruder. Decided by Judge VASON. Ithaca Superior Court, March Term, 1868.

On the 26th of October, 1867, Rutherford and Collins obtained a warrant against Geo. W. Collins, as an intruder. Their affidavit was made before a Justice of the Inferior Court of said county. When the sheriff went to eject Collins, he tendered a counter-affidavit, made before another Justice of said Inferior Court, in which he swore, "he does, in good faith, claim the right of possession of lot No. 137, (lot in question,) and that the whole of said lot is in his possession, by agent or otherwise, and that John

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Rutherford and Stephen Collins do not, in good faith, claim a right to the possession thereof," etc.

The sheriff returned the papers to court. When the case was called for trial, defendant's counsel moved to dismiss the case because the plaintiff's affidavit was made before a Justice of the Inferior Court. The court refused to dismiss the case. The Plaintiffs then objected to the affidavit of Collins, because he had not sworn that he did, in good faith, claim a legal right to the possession of said land. The court sustained the objection. Thereupon, a motion was made to file a new affidavit, so as to make it conform to the statute. The Court would not allow this, and ordered the sheriff to process Collins assigns as error the overruling his objection to plaintiff's affidavit, sustaining the objection to his own affidavit and the refusal to allow the new affidavit filed.

LYON & DEGRAFFENREID, for plaintiff in error.

BOWER, RUTHERFORD, for defendants in error.

WARNER, C. J.

1. The first ground of error assigned to the ruling of the Court below is, that a Justice of the Inferior Court had no authority, under the law, to administer the oath required to eject an intruder upon land in this State. By the Act of 1854, a Justice of the Inferior Court is expressly authorized to administer an oath in all cases where, by law, an oath is required to be taken. See Acts 1853-4, page 29. In my judgment, this power and authority to administer oaths by a Justice of the Inferior Court had not been taken from them by any subsequent legislative enactment at the time the affidavit in the record was made. The objection to the affidavit was therefore properly overruled.

2. The second ground of error is, that the Court dismissed the counter-affidavit, on the ground that the party making it did not state therein that he did, in good faith, claim a legal right to the possession of the land. In *Poulain vs. Sellers*, 20 Ga. R., 228, this Court held, that it was error for the

Court to charge the jury "that the question was whether the defendant, *bona fide*, claimed the right of possession;" this Court holding and deciding, in that case, that "the defendant is required, under the statute, to swear and shew that he, *bona fide*, claims the *legal* right to the possession. The word *legal* is omitted in the Court's charge; and yet, it was evidently designed to be *significant* in this Act." The counter-affidavit not stating that the party making it did, *bona fide*, claim a *legal* right to the possession of the land, was properly dismissed by the Court.

3. The third ground of error assigned is, that the Court refused the motion to file a new affidavit, then at the Court, in accordance with the requirements of the statute. This Act was intended to provide a *summary* process for the ejection of intruders who squat upon other people's land, without any *legal* right to do so, and it is made the duty of the sheriff, under the act authorizing this proceeding, to turn the intruder out of possession, unless he shall, *at once*, tender to the sheriff a counter-affidavit, stating that he does, in good faith, claim a *legal* right to the possession of the land. If the intruder can be allowed to make a defective affidavit, and thereby retain possession of the land, and, when it is objected to, make another and still retain possession, the very object and intent of the Act would be defeated. The Act prescribes the terms by which he can retain possession, and the sheriff is authorized to administer the oath required by it, for his benefit and protection, if, indeed, he does, in good faith, claim a *legal* right to the possession. In our judgment, there was no error in the refusal of the Court below to allow a new affidavit to be made.

Let the judgment of the Court below be affirmed.

Van Winkle & Co., vs. The South Carolina Railroad Company.

J. A. VAN WINKLE & Co., plaintiffs in error, vs. THE SOUTH CAROLINA RAIL ROAD COMPANY, defendant in error.

When a common-carrier receives goods for transportation, and in case of the loss of the goods, seeks to protect himself from liability therefor, on the ground, that the goods were destroyed by the public enemies of the State:

Held, that as the presumption of the law is against the carrier in case of loss, it is incumbent on him to prove, by clear and satisfactory evidence, that the goods were so destroyed whilst in his possession, in order to exonerate him from liability therefor.

Case. Motion for new trial. Decided by Judge Gibson Richmond Superior Court. June Term, 1867.

Van Winkle & Co. sued the South Carolina Rail Road Company for the loss of certain goods, delivered by them to it, as a common-carrier. The defence was that the goods were destroyed by the public enemies.

On the trial, the following facts were shown by the plaintiffs. On the 1st day of February, 1865, the company received from plaintiffs' agent, at Columbia, South Carolina three boxes, containing writing paper, worth \$652 50, and directed to plaintiffs at Augusta, Georgia, and gave a receipt (in the usual form, stating that contents and value were unknown etc.,) promising therein to deliver them to plaintiffs, at Augusta, Georgia.

On the 4th of February, 1865, one of the plaintiffs called at the company's depot and asked Marly, the agent, if the goods were there; he examined, said yes, and told him to send for them. This plaintiff called for the bill of freight; it was presented by one McGrath, and paid; (witness thought Marly was present during all the time aforesaid.) The receipt for freight was as follows:

"AUGUSTA, GA., Feb. 1st, 1865.

Van Winkle & Co.,

To South Carolina Rail Road Co., etc., For Freight Dr.
Per List No. 19, Columbia: 3 boxes 1670.....\$53 50
Paid Feb. 4th, 1865. McGRATH."

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Plaintiffs' porter, on the 4th of February aforesaid, called for the goods and was told to call again, as the cars had not been unloaded; called again in the evening, and received the same answer; called again next morning, and was told that the cars were left on the other side of the river. The person who gave these answers to the porter was an Irishman, who was attending to the delivery of freight at the depot, but the porter did not know him. The plaintiffs showed the value of the goods and closed.

The defendant examined A. W. LEWIS, who testified that he never made said statements to plaintiff, that he was the only authorized agent of the company at that point, to speak of freight, all the others were mere laborers under him; that the distance was 143 miles, and, at that time, freight-trains usually took four, five or even six days to make the run. MARLY testified, that he was the general agent of the company at Augusta, that it was not his duty to receive freight, and it was not usual for him to know whether freight had arrived or not. The custom was for Lewis, the freight agent, to deliver the freight. He did not remember making any statement to the plaintiff, and thought he could not have done so, because he knew nothing about the freight, and thought that the statement was first heard by him when the plaintiff so testified on this trial. He also testified that it took five or even six days, at that time, to get freight from Columbia. The Government used the trains so much that freight accumulated at Columbia, and besides, freight-trains laid over one day at Branchville. Both Lewis and Marly testified also, that freight bills, from which the bills were made out, were always sent by passenger-trains, and that at Augusta the first day, the freight being usually two or four days later in coming, and the bills were often sent before the goods arrived.

The defendant's assistant superintendent, in February, was principally engaged at Branchville, had answered interrogatories, and they were read by the defendant. They testified, substantially, that the United States troops took possession of that part of the South Carolina Railroad between

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Aiken, South Carolina, and Edisto river, between the 3d and 7th of February, 1865; that the Confederate States troops took possession and control of the trains of the South Carolina Railroad, by command of Generals Beauregard and Hardee. The trains of other roads were put upon that road by the same authority, the trains of that road being insufficient for the work needed. There were no trains running regularly between Columbia and Augusta. Cars from Columbia for Augusta, were taken back to Columbia, after the occupation of the road by United States forces; all cars that were in Augusta from Columbia, or elsewhere, were run into the interior of Georgia for protection. The Confederate forces controlled the trains of the defendants at least twelve months before the United States' troops occupied the road. The last cars that reached Augusta from Columbia, left Columbia on the 30th of January, 1865. They were unloaded by Captain Sharpe, Confederate quartermaster at Columbia, and the cars used for Confederate stores, unloaded from cars, and put their contents into depot at Columbia, where they were burnt by United States forces. The evidence being closed, the Court charged the jury, and they found for the defendants. What he was requested to charge, and what he did charge, appears only by the motion for new trial, and the Judge's decision. Thereupon, the plaintiff moved for a new trial upon the following grounds, among others:

1st, 2d and 3d. Because the verdict is contrary to law, to evidence, etc.

6th. Because the Court erred in refusing the following requests which were submitted in writing, to-wit:

1. That common-carriers are bound as insurers, and insure against loss from any cause whatever except the act of God, or of the public enemies. Where the defence is the act of the public enemies, it must be shown to be the act of public enemies.

2. The South Carolina Rail Road Company, the defendant in this case, is a common-carrier, and subject to the

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the common law rule; and is bound to show, to the satisfaction of the jury, that its defence comes under one or the other of the heads stated.

* * * * *

If the defendant had even given notice under the Act of 1863, and afterwards received freight to transport, it would be liable for any and all loss or damage to such freight, even a contract under such circumstances, relieving the non-carrier from liability, would be void and of no effect. The defendant could only plead under that Act (in addition to his common-law defence) by way of justification, seizure by or loss by the act of the Confederate Government.

If the above proposition be true, much more is it true that their liability is clear and unchanged, where they had no notice that they would not receive and transport freight.

And because the Court erred in charging the jury as follows:

* * * * *

If the non-delivery of the goods sued for, was caused by the act of the Confederate Government, or its armies, or the United States Government, or its armies, or the act of God, the defendants are not liable, if from other causes they are."

The Judge refused a new trial.

The plaintiffs excepted, and assigned the same for error on each of the said grounds.

LOOK & CARR, for plaintiffs in error.

M. T. GOULD, for defendant in error.

WARNER, C. J.

It was an action brought by the plaintiffs, in the Court against the defendant as a common-carrier, to recover the contents of three boxes, delivered by the plaintiffs to the defendant, to be transported from Columbia, South Carolina, to Augusta, Georgia, which were alleged to be lost whilst in the possession of defendant. The defence set up by the defendant is, that the goods were

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destroyed by the public enemies of the State. Upon trial, in the Court below, a verdict was found for the defendant, and a motion was then made for a new trial, which was refused. The refusal of the Court to grant the motion for new trial, is assigned for error here. By the law of the State, as defined by the Code, the defendant was a common carrier, and as such, was bound to use extraordinary diligence. In cases of loss, the presumption of the law is against him, and no excuse will avail him, unless it was occasioned by the act of God, or of the public enemies of the State. Revised Code, section 2040. Thus it will be seen that in case of the loss of the goods, the presumption of the law is against the common carrier, and when he sets up the defence, that the loss of the goods was occasioned by the public enemies of the State, the burden of proof is upon him to *establish that fact*. 2d Greenleaf's Ev., 180, section 21. What is the evidence contained in this record? That the three boxes of goods, received by the defendant from the plaintiff, were destroyed by the public enemies of the State. The evidence entitled to most weight upon that question, is that of Gilbert, who stated, "that the last cars that reached Augusta from Columbia, left Columbia on the 30th January 1865—they were unloaded by Capt. Sharpe, Confederate quartermaster at Columbia, and were used for Confederate stores, unloaded from cars, and put into the depot at Columbia, where they were burnt by United States forces." The goods, now sued for, were received by the defendant on the 1st day of February, 1865. The cars that left Columbia on the 30th of January, which the witness swears were unloaded there, and the contents thereof put into the depot at Columbia, where they were burned by the United States force could not have contained the three boxes of the plaintiff's goods now sued for, as the same were not received by the defendant at that time. The burden of proof is on the defendant to show that the *plaintiffs' goods received by him* were destroyed by the public enemies of the State, in order to exonerate him from liability therefor, which the evidence in this record, in our judgment, fails to do. The Court below

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therefore, erred in its judgment, in not granting a new trial in this case, upon the ground, that the verdict was contrary to the law and the evidence.

Let the judgment of the Court below be reversed.

J. MOSHER & Co., plaintiffs in error, vs. THE SOUTHERN EXPRESS COMPANY, defendant in error.

When the agent of the Southern Express Company at Augusta receipted for a package of goods to the shipper, marked "C. A. Robinson, Cartersville, Ga.," and in the printed receipt given by the agent of the company to the shipper, the following words were inserted: "which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation:"

Held, that in case of the loss of the goods, the company was liable therefor, and could not protect itself from its legal liability by shewing that its line of transportation extended only to the city of Atlanta, especially when the evidence in the record shews that fact was *not* known to the shipper, or communicated to him, at the time of receiving the goods, by the agent of the company. HARRIS, J., dissenting.

Held, also, that the evidence in the record, shewing that the goods were seized by legal process, without more, was not sufficient to exonerate the company from its legal liability as a common carrier.

Case. Motion for new trial. Decided by Judge SNEAD. City Court of Augusta. February Term, 1867.

Mosher & Co., through a son of Mosher, delivered to the Southern Express Company, at Augusta, Georgia, two bales of yarns, and took therefor a receipt, in these words:

"SOUTHERN EXPRESS COMPANY,
Augusta, Sept. 4th, 1865.

Received of J. Mosher & Co. two bales yarns, valued at three hundred dollars, and for which amount the charges are made by said company, marked C. A. Robinson, Cartersville, Ga., which it is mutually agreed to be forwarded to our agency nearest and most convenient to destination, and there delivered to other parties to complete the transportation.

* * * * * Nor shall the said company be responsible for the safety of said property after its arrival at its place of destination." * * * * *

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The parts of the receipt omitted in nowise relate to the questions made in this case. It was signed by an agent for the company. The freight was not paid, but was to be collected on delivery.

These goods were not delivered, and an action on the case was brought against the company, as a common carrier, for their value. The agent afterwards informed Mosher that the goods had been taken by legal process, and advised him to replevy them. Mosher believed this statement, because the agent was a truthful man, but did not act upon the advice, because he thought the company was liable to him for the value of the goods. Mosher, plaintiff, did not know that the defendant's line of transportation did not go beyond Atlanta. Upon the facts and proof that the goods were worth \$300 00, the plaintiffs closed.

The defence was, that the defendant, at its terminus, delivered the goods to the Adams' Express Company, and also that they were seized by legal process. The defendant shewed, by Dempsey, that he was defendant's assistant superintendent; that when informed that the goods did not reach Louisville, to which place they were subsequently directed to be forwarded, he wrote to the company's agent at Cartersville, and was informed that they had been taken by legal process; he told Mosher of this, and advised him to replevy them, which Mosher refused to do; he asked Mosher to authorize the company to bring suit for them in his name; this he also refused to do, saying the company was liable to him for the goods; that, at the time of the receipt of the goods, the defendant's line terminated at Atlanta, short of Cartersville, and Cartersville was on the line of the Adams' Express Company, and the agent at Cartersville was the agent of the last-named company, and not of defendant, though defendant did, after these goods were lost, extend their line beyond Cartersville, and employed said Adams' agent as their agent; and that nothing was said, at the time the goods were received, about the defendant's line stopping short of Cartersville. No date is given to said conversations, etc., nor does anything appear explanatory of the alleged legal seizure, except as aforesaid.

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is contained in the following letter, which was read in
 ence, by the plaintiff, in rebuttal:

“SOUTHERN EXPRESS COMPANY,

“(Express Forwarders,)

“Augusta, Ga., Jan. 2d, 1866.

nt Southern Express Company, Cartersville, Ga.:

ear Sir—Enclosed please find a letter from A. M. Franklin, Esq.,
 of Bartow county, in reference to the two bales of yarns shipped
 press to Charles A. Robinson, Cartersville, Georgia. You will see
 letter that the sheriff was acting under orders from Lewistine &
 of Cartersville. The sheriff is not to blame in the case, but we
 ok to L. & P. for the money received for the two bales, and if they
 to pay you the money, please let me know. You will see them for
 Mosher, shipper. Please answer soon.

“Truly yours,

“H. DEMPSEY, Assistant Superintendent.”

is being all the evidence, the Court charged the jury
 he receipt shown in evidence limited the duties of de-
 nt, in transporting the goods sued for, to the end of
 own line, and if they were there delivered for further
 ortion, the duties of defendant were at an end; and
 r, that if the goods were taken from the custody of the
 r by legal process, the plaintiff could not recover.

e verdict was for plaintiff, for \$300 00, with interest
 osts. A new trial was moved for, by the company,
 the grounds that the verdict was contrary to the evi-
 , the charge of the Court and the law. The Court
 ad the new trial, and this is assigned as error.

OK & CARR, for plaintiffs in error.

L. T. GOULD, for defendant in error.

ENER, C. J.

was an action brought by the plaintiffs against the
 as a common carrier, for the loss of goods received
 for transportation from Augusta to Cartersville. On
 of the case in the Court below, the jury found a ver-
 plaintiffs. The Court granted a new trial, which
 ed for error here. The receipt given by the

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agent of the Company on the 4th of September, 1865, the following words: "Received of J. Mosher & Co., two yarns, valued at three hundred dollars, and for which no charges are made by said company, marked C. A. Robt Cartersville, Ga." There is also printed on the face of receipt amongst other things, the following words, "which is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation." It is insisted for the defendant that his line of transportation extends only to the city of Atlanta, and that inasmuch as the goods were lost beyond the terminus of his line, that he was not legally liable for the loss of the goods, and that such was the *special contract* as expressed in the receipt given for the goods. Two questions arise here: First, was the defendant liable under the law as a common carrier, to transport the goods received by him to Cartersville, the place of destination? Second, if he was so liable as a common carrier, could he *limit his legal liability* by the statement made on the face of the receipt given for the goods? As to the legal liability of the defendant as a common carrier, for the loss of goods received by him to be transported beyond the terminus of his own line, the American authorities are conflicting. But the rule is well settled in England, that he is liable, and this as to his liability, in the language of Baron Rolfe, in *Champion vs. Lancaster Railway Company* (4th Meeson & Welsby's Rep. 424,) is not only consistent with law, but is the only one consistent with common sense, and the convenience of mankind." In the case above cited, a parcel was delivered at Lancaster, to the Lancaster and Preston Junction Railway Company, directed to a person at a place in Derbyshire. The person who brought it to the station, offered to pay the carriage, but the book-keeper said it had better be paid by the person to whom it was directed, on the receipt of it. The Lancaster and Preston Junction Railway Company is known to be proprietors of the line, only so far as Preston where the railway unites with the North Union line, and afterwards with another, and so on into Derbyshire.

reel having been lost *after* it was forwarded from Preston, was held that the Lancaster and Preston Railway Company were liable for its loss. See Angel on the law of carriers, section 95. Weed vs. Schenectady and Saratoga Railway, 19th Wendell's Rep., 539. In the case now before the shipper of the goods did *not know* that the defendant's line of transportation did not extend beyond Atlanta, nothing was said at the time the goods were received, the defendant's line stopping short of Cartersville, the place to which the goods were received by the defendant forwarded. The freight, too, was to be paid at Carters-

In our judgment, the only safe legal rule to be established in such cases, is the one recognized and enforced in the case of Muschamp vs. the Lancaster Railway Company, that a common-carrier receives goods to be transported to a certain point of destination expressed upon the face of the receipt therefor, that he undertakes to deliver the goods received, either by his own line of transportation, or that he will do so by his own competent agents for that purpose, and that it is not a good legal ground of defence, in case of loss of the goods, for the carrier to shew that his line of transportation stopped short of the place to which he undertakes to carry the goods, and thereby, protect himself from liability, the more especially, when the fact, as to the extent of his line of transportation, was not known to the shipper of the goods, nor communicated to him by the defendant at the time of receiving the goods. The responsibility of the carrier of goods ceases with their *delivery at destination according to the direction of the person sending*, or according to the custom of the trade. Revised Code, 2044. By the 14th section of the Revised Code, railroad companies, *in this State*, are not liable, as common-carriers, for the loss of goods beyond the terminus of their respective roads, provided the goods are delivered to the connecting road in good order. This provision of the Code, does not embrace express companies, who receive, and undertake to deliver small parcels of goods as common-carriers, for the benefit of the shippers, at certain rates of compensation charged therefor.

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Having shown that the defendant was liable, under law, to deliver the plaintiffs' goods at Cartersville, the place of destination, as expressed in the receipt given for the goods, could the defendant *limit that legal liability*, by the endorsement made on his receipt, in the following words: "which *mutually* agreed, is to be forwarded to our agency nearest and most convenient to destination only, and there delivered to other parties, to complete the transportation"? By the 20th section of the Revised Code, it is declared that, "a common carrier *cannot limit his legal liability*, by any notice given either by publication, or by *entry on receipts given*, or ticket sold. He may make an express contract, and will then be governed thereby." This section of the Code was considered, and construed by this Court, at the last term, in the cases. *Newby vs. Southern Express Company*, 36 Ga. R., 103, and *Purcell vs. the same*, 37 Ga. R., 103. This provision of the Code is, in our judgment, a wise and salutary provision, intended to protect the public from imposition and surprise in the hurried transaction of business with these express companies, in the forwarding of small parcels, as well as valuable packages by all sorts of people, some of whom might not be able to read the printed stipulations annexed to the receipt given for the goods, and if they could read them, they would not be able to comprehend the *legal effect* thereof. In the receipt now before the Court, it is stated, that it is "*mutually agreed*," etc., when the evidence in the record shows that the shipper of the goods did *not know* that the defendant's line of transportation stopped at Atlanta, and that this was not communicated to him by the defendant, at the time of the reception of the goods, and yet, this Court is asked to decide that there was a *mutual agreement* between the defendant and the shipper, at the time of the reception of the goods to be forwarded to Cartersville, that the defendant should not be liable for the loss of the goods beyond Atlanta. This case affords a practical illustration of the wisdom of that provision of the law which declares that the defendant, as a common-carrier, shall *not limit* his legal liability by *entry on his receipts given for the goods*. If he desires to limit

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al liability, as a common-carrier, let him make an express contract outside of, and independent of, his receipt given for goods, and then there will be some *mutuality* in the agreement between the parties; at least, both parties will have a much better opportunity of understanding what is *the mutual agreement* between the shipper and the carrier.

Another ground of defence insisted on by the defendant is, that the goods were taken out of his possession by legal process. If it be conceded that this would be a good defence to the common-carrier, under the law defining his legal liability, still, it must fail in this case, according to the evidence contained in the record. It is not shewn what was the nature, or character of the legal process under which the goods are alleged to have been received, nor does it appear at this instance, or against whom the legal process was sued, or by virtue of which, it is contended, the goods were seized. Whether the seizure of the goods was lawful or unlawful, whether the process was legal or illegal, whether sued against the consignor or consignee of the goods, or against some third party, the record does not inform us. The burden of proof was upon the defendant to shew that it was, at least, a legal process, and that it issued against the proper parties, so as to make it available for his defence. The original legal process, or a duly certified copy thereof, would have furnished the best evidence of its nature and character, as well as who were the parties to it, in order that the Court might judge of the same. The bare statement that the goods were seized by legal process, and that fact communicated to the plaintiffs, without more, was not sufficient, in our judgment, to release the defendant from his legal liability as a common-carrier. In any view of which we have been able to take of the facts of this case, as presented in the record, it is the judgment of the majority of this Court that the judgment of the Court below, granting a new trial, should be reversed.

Verdict reversed.

Justice, J., concurred, but wrote out no opinion.

HARRIS, J., dissenting.

The plaintiffs below, in order to make out their case, put in evidence the receipt of the Express Company, containing the contract between the parties, in these words—"which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and *there* delivered to other parties to complete the transportation."

By the testimony, it appeared that the Express Company's line of operation was from Augusta to Atlanta, and no beyond. The package of goods lost was marked to Louisville, Kentucky. It was lost at some point on the Western and Atlantic Railroad, *beyond* Atlanta. The package was delivered at Atlanta by the agent of the Southern Express Company—that office being the company's office nearest to the destination of the package—to another Express Company using the State road. There was no evidence that there was any partnership or connexion in business between the two Express companies. My associates put their judgment that the Southern Express Company is liable to respond for the loss which has occurred, upon the ground, that when Mosher & Co. delivered the package for transportation, the Express Company did not inform them that their line of transportation extended only to Atlanta. The law makes no such requirement, as I understand it, of common-carriers. The common-carrier, whose route of transportation is between two points, as in this case, is bound only for the safe transportation of the goods from the one to the other, unless by special contract he changes his character as common carrier.

But the awkwardness of the decision of the majority is that it is violative of a legal written contract, engaging to transport safely the goods on their line to their *nearest* agency to the destination of the goods. This is the written contract produced by plaintiff, nothing auxiliary or extending it. The goods were transported safely to Atlanta—no evidence of freight charged or paid beyond. Upon what principle a party expressly stipulating for pay to transport on its line, and *no farther*, can be held liable, without a con-

eration being paid for the transportation beyond Atlanta, the Express Company being connected in the business of transportation with the Express Company beyond Atlanta, on which line the goods were lost, I confess my utter inability to comprehend.

What other notice to the freighter than the written one he had in his hand, was it necessary to give him? Did it not sufficiently inform him that the Express Company engaged to transport his goods only to *its* nearest office next to the destination of the goods, and that then, *at that point*, it would deliver the goods to *other parties*—(that is, a distinct and different common-carrier)—to *complete* the transportation.

Is this clear expression of the limits of the engagement of the Southern Express Company, why did not plaintiffs, if they were in doubt as to how far the line of transportation extended, then inquire, and, ascertaining that it extended only to Atlanta, why did they not make a contract with the company to transport the goods to their destination? It is evident that the plaintiffs neglected to make such inquiries as their interests required, and to protect themselves against all misunderstanding, by their gross carelessness. I do not desire to favor such a class, especially when I cannot do so without violating an established maxim of law. I am bound to hold Express Companies and common carriers responsible to the performance of the duties required of them by not allowing them to evade, by any indirection, their liabilities as common carriers; but when their liability is limited in a matter which the law allows, I dare not extend, by interpretation, their liability beyond what they engaged in. I, therefore, differ with my associates, and think they are in reversing the judgment of the Court below, granting the Southern Express Company a new trial.

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C. D. ADAIR, adm'r of JOHN R. McDONALD, plaintiff in error, vs. JOHN ADAIR, Ex'r of EDWARD ADAIR et al. defendants in error.

1. In a proceeding to reform a deed, on the grounds of fraud and mistake, the declarations of the grantor, made subsequent to the execution of the deed, and in the absence of the grantee, are not admissible to prove a mistake in the deed, which may be corrected in Equity.
2. Before an instrument can be reformed, it must be shewn, by clear and satisfactory evidence, that either by accident, fraud or mistake the written instrument does not contain and express what the party intended it should contain and express at the time of its execution.

Equity. Motion for new trial. Decided by Judge MURPHY. Murray Superior Court. October Term, 1867.

Many questions were made by this record, but only one of them was passed upon by the Court. John Adair, as executor of Edward Adair, deceased, and others, heirs of Collins McDonald, complained that Edward Adair died in 1818 testate; that he had made a will, devising certain lands to complainants and John R. McDonald, the brother of complainants, his grand-children; that John R. died, and afterwards, said testator made another will, devising said lands to complainant, and died. But before John R. died, he lived with the testator. Testator was old and confiding. John R. was young and artful, and had obtained control over the mind of testator, and fraudulently induced testator to believe that his first will was insufficient to convey said lands to John R. and his said sisters, and that because their father was dissipated and wasteful, if testator should die, they might lose the land by said father's extravagance, and begged said testator to execute a deed, conveying said land to said John R. for the joint and equal use of himself and his said sisters. Testator told him to draw up the deed; that John R. drew a deed, conveying said land to himself absolutely, free from any trust, and the testator signed it on the 15th of January 1861, while drunk, and without examination; that John R. got the deed from testator, by some means, without the testator's delivering it as a deed, and immediately took it

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Clerk's office, and had it recorded; that testator continued to live on the land till his death, to-wit: on the 21st of September, 1864, and neither said John R., in his lifetime, his administrator or heirs, since his death, asserted any title to said property, until the death of said testator. But Charles D. Adair, as the administrator of said John R., brought ejectment for said land against the complainants, as tenants in possession, while suit is pending.

The bill charged that the said testator intended to have conveyed said land to John R., for the use of himself and complainants, that, by the fraud of John R., it was not so made, and prayed that the deed be reformed, and that John R.'s said administrator be decreed to hold said lands, as trustee for their joint use and benefit, and that the ejectment cause be dismissed, etc.

The defendant answered that Edward Adair, by his first will, gave this land to John R. only, and afterwards, on the day he made said deed, told defendant that he feared that John might be cheated out of it, and, therefore, he intended to make him an absolute deed to the same, and inquired for one Hanson, to witness the deed, (whose name appears as a witness to the deed;) that John R. lived with testator, was honest and industrious, and by his good conduct had influence over testator, but testator was not imbecile nor easily imposed upon; that the first will was destroyed, and afterwards he was induced, when John R. was dead, to make another will. The language of the last will was: "The residue (after paying debts) of my estate, real and personal, I give and bequeath, and dispose of as follows, to-wit: To the heirs of Collins McDonald, my beloved grand-daughters, one of all the land belonging to me, so far as not to interfere with any of the privileges by my son, John Adair, hereunto granted him; the above named heirs are to receive the benefits thus donated, until the youngest is dissolved by marriage, or otherwise; the land shall then be made equal distribution made to all of said shares." And defendant answered that the testator intended to convey the lands, and not the ninety-five acres conveyed to

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John R. He further answered, that while he did not know how the deed was delivered to John R., he believed it fairly obtained; that after the date of the deed, the testator never paid taxes on said ninety-five acres, but John R., in lifetime, and defendant since, had paid said taxes, and the testator, after John R.'s death, induced this defendant who was testator's brother, to administer on John R.'s estate saying that John R. has nothing but said land. He testator occupied said land, during his life, by a verbal understanding with John R. He insisted that the deed was right and that his action of ejectment should proceed.

During the trial, the Court allowed several witnesses to give in evidence the sayings of testator (made after said deed was executed,) to show that he understood it as a trust as averred in the bill. These sayings were objected to, and were not offered, but the objection was overruled.

The verdict was, that the deed should be reformed, etc. A motion for new trial was made on various grounds, including the overruling of said objection. The Court refused a new trial, and this is assigned as error.

AIKEN, DABNEY, for plaintiffs in error.

R. J. McCAMY, C. D. McCUTCHINS, for defendant in error.

WALKER, J.

This was a bill filed by the executor and legatees of Edward Adair, to reform a deed made by testator, to John McDonald. During the trial, the Court permitted the testimony of Edward Adair, made after the execution of the deed and in the absence of the grantee, to be proved on the part of the complainants, for the purpose of showing that the deed, as written, did not speak the intention of the maker. The admission of this testimony was objected to, and assigned as error in this Court. Section 3735 of Rev. Code says, "Testimonies of privies in estate, after the title has passed on them, cannot be received." This is conclusive in this case. It is admitted by both sides, that the title passed out of

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tator, and his sayings, made after the deed, were proved defeat the title of John R. McDonald, the grantee named the deed. These sayings were made in the absence of John McDonald, and some of them after his death. This testimony was inadmissible, and on this ground, we reverse the judgment of the Court below.

As there is to be a new trial, it would be improper to pass on the question as to the weight of the evidence.

Some of the questions growing out of the charge of the court, and the requests to charge, are interesting, but perhaps not necessary to pass upon them *seriatim* now.

In *Admr. of Ligon vs. Rogers*, 12 Ga. R., 255, the Court says, "That a court of equity has jurisdiction to correct mistakes in written contracts, has been solemnly adjudicated by this Court. It is a jurisdiction, however, which will always be *cautiously* exercised." Again, in the same case, on page 288, the Court says that the written evidence of the intention of the parties must prevail, unless the party can show, by clear proof, and satisfactory evidence, that either by accident, fraud or mistake, the written instrument does not contain and express what the parties intended it should contain and express, *at the time of its execution.*" In *Shellburne vs. Inchiquin*, (1 Brown's Ch. 347,) Lord Thurlow said the evidence must be *strong, irrefragable evidence*. By this, we understand that evidence offered to establish the *mistake* must be equivocal, uncertain, contradictory, or doubtful in its character. The evidence to show a mistake in a written instrument, must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. *Gillespie vs. Smith*, 2 J. C. R., 585." Again, in *Wyche vs. Green*, 16 Ga. R., this Court says, "In every case, under this head of the law, the only question is, does the instrument contain what the parties intended it should, and understood that it did? If not, then it may be reformed by clear proof, so as to make it the evidence of what was the intention, or contract between the parties." A court of equity will relieve from the consequences of mistake in written instruments, but the power is exercised with caution, and

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to justify it, the evidence must be clear, unequivocal and decisive, as to the mistake. Rev. Code, sec. 3062. Such is the language of our law in relation to the power of the Court of Equity to reform written instruments, and the rules by which it will be governed in the exercise of this jurisdiction.

Judgment reversed.

EGBERT B. WHITLEY, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Before refusing to continue a criminal case, the Judge should inquire what diligence has been used by the accused, when he learned that the witness would testify to a material fact, what opportunity he had had for preparation, when the transaction occurred, etc., and if the showing appears to be *bona fide* made, time should be given.
2. When negroes were, as *tales* jurors, put upon the prisoner, and he challenged the array, and, by consent, the negroes were put off the jury, and the prisoner made no further objection to the panel, his challenge to the array was waived.
3. Dying declarations of opinions, not facts, are inadmissible as evidence.
4. When the charge of the Court assumes certain things as facts, and is in such shape as to intimate to the jury what the Judge believes the evidence to be, and that they made defendant guilty, a new trial will be granted.

Murder. Motion for new trial. Tried before Judge HUTCHINS. Walton Superior Court. February Term, 1868.

The defendant moved the Court to continue said case, in writing, as follows: That, by reason of the recent occurrence of the fact, to-wit: on the 27th of January, 1868, and the prevalence of popular excitement against him in the county, he believes he cannot go safely to trial at this term of the Court; that in the rencontre in question, deponent received two severe pistol-shot wounds, one through the testicle and left thigh, the other through the body, from the effects of which he has not sufficiently recovered to enable him to endure the fatigue and excitement of the trial; that having

been, since the occurrence referred to, all the while closely confined in jail, under guard, and not allowed to communicate with his friends, and suffering great bodily pain from said wounds, he has had no opportunity properly to prepare his defence, the want of which opportunity is more specially apparent in this, viz: on the day of the occurrence there was a large crowd in town; there are many witnesses to the facts, amongst whom defendant has, as yet, been informed of the name of only one, besides his son Tom, by whom he could prove that, at the moment the difficulty began, he, deponent, snatched the pistol used in the rencontre from his said son: this was — Stephens, who has, unfortunately, died since the fact occurred; but deponent believes he can produce others, by the next term of the Court, if opportunity is allowed him to do so, by whom he can prove the same fact." This motion was strengthened by the testimony of Dr. N. L. Gallaway, who had been attending physician of prisoner, who testified as to the wounds defendant received, their serious character, not necessarily mortal, but necessarily very painful, especially the one through the testicle; that whilst witness could not say that defendant might not stand his trial without serious injury, he thought there might arise serious consequences, and if the defendant were under the control of witness, as physician, he would not think it proper or prudent for the defendant to stand his trial in his then present condition; he could not say that he would suffer from the trial; wounds all were healed except a small place in his back, and he was in good health. The Court overruled the motion for continuance.

The Court proceeded to empanel a jury. The first panel being exhausted, the State put the second panel of jurors upon the defendant, who challenged the array because eight of the talesmen were negroes, and not free citizens, of said county, and not, by the laws of said county, competent to serve as jurors, to try said case. These jurors were, by both parties, subsequently excused, and the Court had overruled the objection, and put the case upon the prisoner.

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On selecting the jury, seventy or eighty jurors, on the *voir dire*, disqualified themselves for cause, on account of bias and prejudice, and of relationship to prisoner. The jury having been empaneled, the State proceeded to the introduction of testimony, a brief of which appears hereafter and offered in evidence, the sayings of Wommack, the deceased, made a short time previous to his death, to-wit: "That it was hard to be killed for telling the truth; that God knew he told the truth, and Eg. knew it was the truth," as dying declarations. Defendant objected, on the ground that the sayings were irrelevant, and not admissible as dying declarations, though made *in extremis*. The Court overruled the objection, and admitted the testimony.

The evidence was as follows :

FOR THE STATE.

Dr. W. S. R. HARDEMAN: I was crossing street from Court-house; Sheats was in front of me; some one in front of me; believe it was 17th January, County-Court day, 1868 Walton county; while crossing, saw Wommack opposite Roberts's store, walking fast; when he got to Roberts's store son of E. B. Whitley was standing there on stoop; when deceased passed, young Whitley said something to Wommack didn't hear what it was; Wommack checked his gait, made some reply, think he said "you can't do it;" can't remember certainly; Wommack passed along slowly, sorter sideways prisoner came from towards Fletcher's; when approached, asked his son "what the damn rascal wanted;" didn't hear any reply; prisoner said he could give the "damn rascal what he wanted," I think that is what prisoner said; prisoner continued to approach, and Wommack going along sideways, but watching prisoner; (on the side-walk, this was;) Wommack called to prisoner not to approach on him; prisoner continued to approach, and Wommack going on; about that time Wommack drew a pistol, and, I think, had it out, he reached out about that time looked, and Whitley drew his pistol, and Wommack fired; couldn't say positively where prisoner drew pistol from, but think he had both hands in his coat pockets

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I think prisoner drew his pistol out of his pocket ; young Whitley was on Roberts's stoop, a few paces from the firing ; firing commenced when prisoner was a few yards ; Whitley went straight on, made no pause ; Whitley asked his son what the d—d rascal wanted ; Whitley received nothing from his son that I saw ; commencing firing, Wommack first, Whitley answered the fire, and Wommack again ; Whitley tried to fire again, and pistol failed ; Whitley fired soon as he drew the pistol ; think pistol was in left hand, not certain ; Whitley and Wommack drew his pistols before either fired ; I had a horse between me and Whitley, and halted until Wommack ran off ; Mr. Wommack ran off around the square ; saw him full length, on his face ; examined him ; I considered him a dead man ; he asked me if I could do any thing for him ; I told him that I hoped he would not die, I would examine him ; I did examine him, and told him he could not live (he said that it was hard to be killed for telling the truth, and God knew it was the truth, and that Eg. knew he (Wommack) told the truth ; deceased was wounded in right breast, above the nipple, between the third and fourth ribs with a pistol ball, small one ; probed, but couldn't tell how deep it was ; ball didn't come out ; died in two hours ; died from effects of the wound, by hemorrhage from the wound ; knows nothing but what Wommack said about the nature of the difficulty ; died in Walton county ; am practising physician.

Cross-examined.

1. Whitley received two shots ; did not examine them with a probe : one about the false rib, left side, the other touched the stomach ; did not examine because he would not suffer himself to probe them ; Mr. Wommack drew his pistol and fired ; I thought he could have fired twice ; two first fires were simultaneous ; Wommack then fired again ; think they were repeaters ; I was looking at both at the time ; I was in and out of court-house several times during the

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Re-cross-examined.

Saw nothing pass between Whitley and his son. If young Whitney did give his father anything, I did not see it. The two fires mentioned, one was by Wommack and one by Whitley.

WM. C. SMITH : Difficulty was on the 27th of January, 1868, in Walton county, on County-Court day. Dad was about to start home ; up at Mr. Bullock's store, I saw Mr. Wommack coming in a fast trot from the court-house steps, and Wommack went into Mr. Bullock's store and I followed him ; Mr. Whitley was on the steps, but wasn't following Wommack ; I met Mr. Wommack coming to the door ; Wommack went there to get some money from Bullock for his fees ; I heard Mr. Whitley coming in the store, didn't see him ; Whitley asked where the damn rascal was that swore a damn lie against him, and that he intended to have revenge ; Wommack was in far end of room ; don't know whether Whitley was in the house or on the steps ; I didn't see him ; Mr. Wommack jumped out of the back door ; last I seed of him he was running around by the well ; next time I met Wommack about Smith's store and I give him the money Bullock gave me for him ; I went back to Bullock's and Mr. Whitley was there ; he talked a good deal ; don't remember all he said ; said he had paid out \$30, and he had \$30 more to pay out, when I told him to keep quiet ; he was walking about ; spoke to his son Tom ; son Tom had his pistol ; he told him to give it to him, (Whitley,) and his son sorter refused to do it at the start ; son was handling the pistol ; he asked him for it again and the son gave it to him, (Whitley,) and Whitley put it in his right hand breeches pocket, I think ; I went out doors and Whitley staid in the store : after awhile he came out and I told him not to go where Wommack was, that Wommack was prepared for him, and Wommack had said he would kill him, and he was going to die before he run any more ; Whitley 'lowed if Wommack could kill him, Whitley, before he could kill Wommack, he

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had friends that could bury him ; Whitley called to his son to come on ; he was going towards Wommack ; I followed Whitley down and told him he had better not go, that Wommack was prepared and would kill him ; followed a good piece, but I stopped ; when he (Whitley) put the pistol in his pocket, I went out of the store and left him in there with his sons ; don't know who had the pistol when they came out of the store ; when they got pretty close, Wommack drew his pistol ; Whitley said something I didn't hear ; Wommack told him (Whitley) to stand back and not to come any further ; Wommack backed with his pistol drawed, three or four steps, may be further, may be not so far ; Whitley was going forward toward Wommack ; presently got to firing ; Mr. Wommack had his pistol cocked and up ; Wommack fired first, and Whitley fired then ; could not see Whitley's pistol until he drew it, and Whitley fired as soon as he drew his pistol ; Whitley had his pistol out before Wommack fired ; I think that there was five shots fired ; Wommack fired twice ; couldn't tell who 'twas fired all the time, it so mixed up ; Wommack and Whitley's first shots were very near together, Wommack firing first ; Jim Whitley was behind him ; didn't see Tom ; didn't see Whitley stop, but I was looking back a good deal, talking to the crowd ; I didn't see Whitley make any halt ; they were about ten steps between them when they commenced firing ; didn't see any one else taking part ; his sons were following ; Whitley said the man ; he, Whitley, didn't say who it was ; said good deal ; if Whitley mentioned his (Wommack's) name, I have forgotten it.

Cross-examined.

Mr. Wommack shot twice ; didn't examine Mr. Whitley.

CALVIN L. SMITH : Saw deceased go over steps towards Wommack's store, briskly ; went into B.'s store ; Whitley came up, and said he was going to whip that rascal that was lying against him. (This was soon after deceased passed.) Witness if he had anything against him ; said no ; then went towards Bullock's, and went into piazza ; said he was best

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man in town; saw deceased go out back door, and round back buildings, running; do not remember any one go into the house but Wommack; Whitley tight; saw W. after shooting; had blood on his shirt was in the evening; County-Court in session; did W. have a pistol.

EZEKIEL PATRICK: Was bailiff, attending County-deceased was a witness against Whitley, in a prose against Whitley in that case; was at court-house steps Whitley walking down side-walk, fast; Wommack walking in front of him, and rather turned and walked ways; told Whitley not to rush on him; Whitley started; Wammack fired first, I think; (both had drawn when I first saw them;) it was nearly simultaneous hardly the crack of your fingers; Wommack was back in a stooping position, with a pistol in his hand, don't rush on me, several times; Whitley had his drawn too; I think there were five shots fired; I Whitley shot twice; Wommack fired three times; Wh snapped once; both were six or eight-inch barrel repe never heard Whitley saying anything before; I had gone out; they told me Whitley had to pay \$30 00 cost of suit.

Cross-examined.

Had just walked out; discovered Mr. Whitley first a little before him was Mr. Wommack; firing commenced soon after, when they got close together; Whitley was twice; didn't examine the wounds; only saw his clothes where the ball had entered; two witnesses, I think Wommack and his brother-in-law; prosecution in the County Court; Mr. Sorrell's too; I don't remember about Mr. But I believe he was examined that day; Madison Smith, They were from ten to fifteen feet apart when they fired.

Rebuttal.

Don't know when he died; he was about dead when I was late in the evening.

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SEPH P. HALLIS : Saw Mr. Whitley come up after Wommack, from towards Bullock's; Wommack had been there a minute; Wommack told him not to push on him, not to advance on him; understood Whitley to say that Wommack had begged enough; not certain; Wommack drew his pistol, and Mr. Whitley drew his; they were about ten or twelve paces apart; Whitley kept advancing towards Wommack; stepped about six paces, when the firing commenced; can't tell who fired first; couldn't tell any difference in reports, so near together; Wommack was shot in the breast; died about six o'clock that evening; he was there in the afternoon; I saw Whitley's son standing on the steps of Roberts's store; if there was anything said or done between Whitley and his son, I didn't see it; Whitley didn't know he was walking slowly; didn't see Tom give his father the pistol; he might have slipped it to him without my seeing him do it.

Cross-examined.

He was on the steps about two or three minutes; first I saw Wommack come from behind Bullock's store, running; then, some time, I saw him coming up in front of Roberts's store, when Whitley's son said something to him, and he stopped; never saw him go above Roberts's when he came; I was sitting on the steps; saw some excitement over Roberts's, and I stopped there; don't say Whitley didn't get the pistol from his son; he passed between his son and me; shots fired; I can't tell who fired first or last; little difference; if anything, Mr. Wommack fired first, if there was any difference; Mr. Wommack fired first after that; I saw Tom Whitley spoke first, talking low; I saw Wommack as far down as Lunsford's store, moving up towards Bullock's store; that is, in the same direction as Bullock.

Rebuttal.

Wommack kept going backwards; seemed to be trying to get away from Davis when Whitley was going towards him.

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JOHN W. DAVIS: I never heard Whitley make any threats more than to ask where was the rascal that had swore the lie on him, that he could whip him; said it right there at the court-house steps, a few minues after the trial; called no name; didn't know who he was referring to at the time; he didn't say at the time; I don't really know, I 'lowed 'twas Wommack; if any one had swore the lie, it must have been Wommack; he mentioned no names; never heard him make any threats about Wommack, or have any pistol previous to the trial.

Cross-examined.

I think Whitley was drinking; don't know for certain; saw the shooting; Wommack fired first; very little difference between the second shots, they were so near together couldn't tell, all mixed up; couldn't tell any distinction; I think there was three shots; two were a double shot; they came after Wommack's first shot; saw Tom Whitley, and I heard Wommack and him talking; could not hear what they said; saw no arms; Wommack I first saw come out of Lanier's front door, walking backwards and forwards, twice; I think; saw Whitley coming down the street; Lanier's is about forty yards below Roberts's store.

Rebuttal.

I am cousin of Whitley's wife; the part of town where they were was the business portion of the town.

Sur-rebuttal.

Saw in Whitley's clothing where he was shot; don't know whether prisoner is right-handed or not; never noticed him using his left hand.

L. ETCHISON: Whitley never said anything to me about his pistol on Christmas day; saw Whitley with a navy pistol; he made no threats against Wommack; never heard him say anything about the prosecution.

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W. BULLARD: First of Christmas days, 1867, Whitley got a five shooting pistol from me that belonged to E. T. Hill; Whitley wanted to buy it from me about Christmas time; said that he would try it, and if it suited him, he would buy it; said nothing about a prosecution; only said he wanted to buy it.

EDWARD T. HILL: Did deposit a pistol with Bullard: same pistol that was used in the shooting by Whitley; don't know where the pistol is now; I gave it up to the officers; I got it from Mr. Herrin.

BENAGER S. SHEATS: The first I saw, I was at the trial, and walked out, and as I got to the door-step I looked in the direction of Mr. Bullard's store; saw Whitley and his son go in; didn't see Wommack until he came in from behind the brick houses—Lunsford's corner; this was about as quick as a man could run around them; I went to Lunsford's, and Whitley came out of Bullard's and walked down, and Wommack was some where near Eli Smith's door; as Whitley approached, Wommack rather gave back, and, after awhile, said, stand back, Mr. Whitley; and when he had backed between the two doors, Wommack drew his pistol; Whitley said then, damn you, something, and very soon drew his pistol; me and Lunsford being in range, we stepped inside of the store; didn't see the shooting; the reports were nearly same time; Whitley had just got his pistol out, don't think he had raised it; the reports were nearly same, one a little before the other; Wommack, as he gave back, would say, stand back; Wommack lived an hour or more.

Cross-examined.

First time saw Wommack he was coming around Lunsford's corner; he came up to Smith's store and walked backwards and forwards; two first shots almost simultaneously; wasn't much difference between any of them; next one very soon after.

WARREN MCGAUGHEY: All I heard Whitley say was

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at Bullard's store; Wommack was in there by me; Wh came to the door and asked where was the damn rascal swore a lie agaist him, and said he would have reveng die; saw no pistol; when Whitley came, Wommack ju out of the back door and run off; it is five feet from ground; no steps to it; I understood Whitley to allu Wommack in the remark he made.

FOR THE DEFENDANT.

DR. N. L. GALLAWAY: Whitley was wounded in places; one left side, just below false ribs, and lodge rectly back under the skin; the other entered upper thi right testicle, made its exit through middle third of the then entered just behind the middle of the thigh, ran downwards (ran just above the knee) and lodged; no of exit; both wounds considered serious, but not necess mortal; think wound mentioned penetrated the hollow; no track where it passed; didn't probe it; extracted bal or eight days after; between two-thirds and a half pi puss and blood; ball was extracted from the back; am oner's physician; saw Whitley that evening; was very i ous and nauseated; gave medicine to see if his bowels wounded; had active operation; waited on him once a da six or eight days; seen him through the window every since; testicles were swollen considerable for four or days; testicles and scrotum doubled by swelling.

Cross-examined.

Action of medicine evidenced that bowels not woun matter necessarily must ensue by the ball remaining in wound; this means his nuts were cut.

THOMAS WHITLEY: I was at Bullock's store with fa to settle an account between him and Bullock about the that had accrued that day; pistol got in his father's boot I took the pistol out of the boot; father took it, and la on the counter, and I took it up, and went out in the pi and dropped it in my pocket; he then asked me for it,

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fused ; afterwards gave it to him ; we walked on down street towards Mr. Fletcher's store, and I took the pistol, went down to Roberts's store ; went on the stoop, and at that time, Mr. Wommack came up the street ; he had a pistol in his right breeches pocket, with his hand on it ; he walked up and down the street, I think twice, and me and Wommack had a few words, and father asked what Wommack wanted, and said, I have been begged all day not to have any fuss with him ; I told him that I didn't want to, and didn't intend to have any but that he (Wommack,) had been jawing with me all day ; I had the pistol when I went down there ; father saw Mr. Wommack's pistol, and took the pistol, with his right-hand, out of my pocket ; I saw Wommack's pistol drawn then ; when we went to Bullock's, only father was in the party with us ; I had gone down from the front-house ; soon after, Wommack came down, and passed down the street, and then father soon after that ; father was talking, was the reason I took the pistol from him.

Cross-examined.

Father had pistol when we went to Bullock's ; don't know where he got it ; I had never had the pistol that day, till we went to Bullock's store ; I gave the pistol to father at Bullock's ; while I was at Roberts's store, and when father asked me what Wommack wanted, father took the pistol out of my pocket ; Wommack was just below him ; between Annally's and Roberts's, about Smith's door ; I am his son ; I came to town with father and brother ; that was the only pistol in the crowd ; me and another brother were here that day.

MADISON SMITH : I got a pistol from Mr. Wommack when the Court adjourned ; I kept it an hour or so ; I met Wommack in the evening, on the street, right at Lanier's grocery, and when we got to the grocery, I gave him the pistol ; Wommack turned and came up in the direction of Bullock's ; this was a few minutes before the firing commenced.

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Cross-examined.

Wommack met me below Lanier's store, and he was going down the street; said he wanted his pistol; nothing more.

B. L. LANIER: Whitley bought two or three bottles of liquor from me that day: he kept his liquor there, and came several times during the day; I thought he was under the influence of liquor; didn't know exactly how many times he came there.

L. A. ROBERTS: I was in the back room of my store when the difficulty took place; I saw Mr. Whitley's son, the youngest of the two, the one in Court, on the stoop; he had been there but a few seconds until Mr. Wommack passed; in the passing was conversation between them; young Whitley said in the conversation that Wommack was a better man than he was, but I am as well fixed as you are; about this time his father walked up; asked Wommack what he had to do with him, (his son) you damn —; and they, (Whitley and his son) walked off together in direction of Wommack; in a few seconds the firing commenced; didn't see the firing; was in the back room of the store; store is forty or fifty feet long; did not see Wommack pass but once; he was going towards Smith's store, down the street; when Whitley came down, he didn't halt in front of my store; I didn't see him stop; I don't think, as well as I can recollect, that he stopped; door four or five feet wide; son was standing on the stoop when his father passed; would have seen him, he thinks, if he had stopped.

Rebuttal for State.

JAMES S. BULLOCH: Heard the testimony of young Whitley; had no account with me to settle; there was some of the costs unpaid, and Whitley had agreed to deliver a bale of cotton; this arrangement was made on the court-house steps, before he went to my store; he was to bring the bale of cotton the next, or the day after; Whitley owed me no other account; if there was any pistol put on the counter, I

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didn't see it; they were in the fire room most of the time; I was behind the counter, in the front room, most of the time; don't think there was any one in the fire room except Whitley, his sons, and Jim Melton; there are no counters in the fire-room; there are some desks; I was in the store room all the time they were there.

Cross-examined.

I don't think he did put the pistol on the counter, I didn't see it, if he did; Whitley had the pistol in his hand when he went out of the store; think he was drinking that day; am special bailiff of County-Court; I do collect costs, but don't think its my duty to do so.

B. S. SHEATS: I was expecting the difficulty, and saw Whitley's son standing at Roberts's door, (the youngest of the two;) Whitley was above the store, coming in that direction; and I don't recollect that he halted; I kept my eye on him until he drew his pistol; I rather think I would have seen him if he had got a pistol from any one; I didn't see him get any pistol.

Cross-examined.

I think his son moved a little; didn't move as near to Wammack as his father; he was behind his father.

WARREN MCGAUGHEY: Saw Whitley pass his son at Roberts's; was noticing Whitley, as he passed; if he halted I didn't see him; I didn't see him get any pistol from his son; didn't see him receive anything from his son; had my eye on him.

Cross-examined.

I was right up in front of Bullock's store; had one foot on the steps and one on the side-walk; there was one man between Mr. Whitley and me; there was nothing that obstructed my view; I could see them; it was about fifty or sixty yards; was one man between me and Whitley; wasn't

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right between us ; he was a little on the edge of the sidewalk.

The Court having read the Code and explained the different grades of homicide, made the following charges: "To constitute self-defence, it must appear that the person killing was placed in a situation where it was necessary for his own preservation, that is, that he had no reasonable means of escape ; that he was obstructed, or the assault or the attack on him was so fierce as not to admit of his escape. If he attempt to escape from it, but is unable to do so, and kills his assailant to preserve himself, or if the attack be such as to admit of no delay, and he destroys his assailant, in either case, he is justifiable, and guilty of no offence. Under this principle, and the principle laid down in the Code, which has been read to you, you will, in this case, carefully examine the facts as developed by the evidence, and see if the defendant has brought himself within the law of self-defence, and if so, he is guilty of no offence. But if you should be satisfied, from the evidence, beyond a reasonable doubt, that the defendant deliberately determined to assail the deceased with the purpose of taking his life, or doing him some grievous bodily injury, and the deceased knew this fact, and that in his rencontre with defendant, he was acting in self-defence, it is no difference, whether he fired the first shot or not, as he had, in that instance, a perfect right to destroy assailant to preserve himself, and if he only acted to that extent, he was guilty of no offence.

"If he failed, in his defence, to destroy his assailant, and his resistance was overcome, and the defendant succeeded in carrying out his original purpose, and killed the deceased, then it is murder, notwithstanding the deceased had prepared a weapon, and had endeavored to destroy his assailant to save himself. The law is careful of human life, and allows all men to protect themselves ; they need not wait until the assailant has inflicted the fatal blow ; he need not wait till the resistance is impossible ; but whenever the circumstances are such as to excite the fears of a reasonable man that his

n is in danger, he may use all the means that God and e have provided for his defence and preservation. But is he must not go beyond what is necessary for his ce; if he does, then his acts become revenge, and not ce, and he is guilty of crime.

f your minds are satisfied, beyond a reasonable doubt, defendant was armed with a deadly weapon, and was ing the deceased with threats of vengeance, and the sed knew those facts, he had the right to arm himself estroy the assailant, and preserve himself, and his attempt o so, and failing, is no justification for the defendant. e two were willing to fight, if they mutually armed selves for the combat, and met, and fought on equal s, both doing so wilfully and determinately, with the tion of taking the life of the other, the slayer would be y of murder. But if they had a sudden quarrel, and e spur of the moment, in the heat of passion, without editation drew weapons and fought, and one killed the r, it would be voluntary manslaughter, because there was eliberation or malice prepense. Again, when two per- fall out and fight, and one of them declines the contest, uts out of it, and the other pursues him, and makes a attack on him, and he turns and kills his assailant, he is able, having, in good faith, declined the contest, and avored to save himself. Again, when one forms a desire et another engaged in a fight, and brings it on after ring the other into it, kills him, in pursuance of a design ed for that purpose, the attack or resistance of the other e defence, and the slayer would be guilty of murder, e of the previously formed design and intention to take life."

he Court charged the jury upon the subject of reason- doubts, and upon positive and negative evidence.

endant's counsel requested the Court to charge the

That if the jury believe, from the evidence, that the and fired the first shot, and that in doing so he manifestly vored, by violence or surprise, to commit either murder

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or manslaughter upon the person of Whitley, that W would be justified in taking his life, to prevent him doing so; and that, in order to determine what degree of force Whitley was authorized to use, the jury should inquire what was the degree of criminality which the law fixed upon the act of Wommack, under all the circumstances, in drawing his weapon and firing, in the manner and at the time they may believe, from the evidence, he is shown to have done; and if the jury believe that the prisoner killed the deceased to prevent the deceased from inflicting upon him a serious injury less than a felony, which the deceased was at the time manifestly endeavoring to inflict, the offence would be manslaughter, and not murder.

Second. That if the jury believe, from the evidence, that the deceased killed the prisoner in the encounter, and the circumstances were such as to have justified him in doing so, still, if the prisoner killed the deceased to prevent the deceased from killing him, and really acted on that motive, and not in a spirit of revenge, his offence is manslaughter, and not murder.

The Court charged, as requested, qualifying the first request by saying to the jury, after reading the request, "that is true, as a general principle of law;" and qualifying the second request by saying, "to that I have added, unless he brought about the necessity of killing the deceased himself," without explaining further.

The jury returned a verdict of guilty; whereupon counsel for defendant moved for a new trial, on the following grounds:

First. Because the Court erred in overruling the motion for continuance.

Second. Because the Court erred in overruling the objection to the array of the second panel of *tales* jurors taken in the trial, and in putting the panel upon the prisoner.

Third. Because the Court erred in admitting the statements of the deceased as dying declarations.

Fourth. Because the Court erred in the charge to the jury.

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Fifth. Because the verdict of the jury is contrary to law and the evidence.

Sixth. Because the Court erred especially in that part of the charge which relates to the law of self-defence, and to the legal effect of the question whether deceased drew his weapon and fired first, by charging, in substance, that if the deceased, under the facts of the case, was justified in doing so, but the prisoner succeeded in killing him, even though done to prevent himself from being killed, it was no justification, and he would be guilty of murder.

Seventh. Because that portion of the charge, given on request of prisoner's counsel, is inconsistent with the rest of the charge.

Eighth. Because the Court erred in qualifying, as he did, the request of prisoner's counsel; said qualification being calculated to lead the jury to believe that the Court did not regard the principle contained in the request as applicable to the case.

Ninth. Because the Court erred in qualifying, as he did, the second request, without explaining further that this necessity must have been brought about, not by threats or opprobrious words alone, but by some overt act, in furtherance of such threats, in order to preclude the prisoner from all right to have defended himself.

The motion was overruled by the Court, and counsel for defendant excepted.

The defendant was sentenced to be hung. Whereupon writ of error was sued out, assigning as error the refusal of the new trial on each of said grounds.

GEO. HILLYER, WALKER & McDANIEL, W. W. McLESTER, for plaintiff in error.

S. P. THURMOND, Solicitor General, (by brief,) for the State.

HARRIS, J.

There are many assignments of error made by the bill of exceptions, but we propose to confine our opinion to those only which we deem most material. The first is the refusal of the Court to *continue* the case. By paragraph 4553 of the Revised Code, it is evident that the policy of the law is that of a speedy trial, and hence the direction that a criminal case shall be tried at the term of the Court at which the *indictment is found*. This rule was not intended to be inflexible; it is a general direction, subject to such modification as the principles of justice demand; thus, the absence of a material witness is a sufficient ground to change it. It may so happen that the witness has not been subpenæd, and the question might arise, whether, in such an event, the trial could be postponed.

Instead of denying a continuance, the circumstances should control the decision. What diligence was used? When was it discovered that such persons would prove a material fact for accused? What have been the accused's opportunities for making *preparation* for trial? How long since the transaction occurred? and other similar matters which may be presented. These are all to be considered by the Court in the light of the administration of justice, and when the delay sought appears to be sought in good faith, with the view to a fair trial, time should be accorded, and especially where *no* opportunity for preparation has not been had. Expense *may* accrue to the county by a continuance permitted to an accused person, who happens to be insolvent, but such a consideration must not be regarded for a moment when the paramount principle of giving a fair trial demands the postponement. The State can never be supposed to have any wish but for a fair trial. Her honor and her justice should not be compromised by her officers pressing forward hastily the trial of an accused person, when, from the circumstances, it is apparent that he will be cut off from the probable means of vindication. That the spirit of our laws is opposed to a harsh *and*

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rigorous interpretation, is evinced by a subsequent clause in the paragraph cited; that clause provides not only for a continuance from the term at which the indictment was found to the next succeeding term, but expressly confers the power on the Court to allow continuances, from term to term, *as often as the principles of justice may require, on sufficient cause shewn on oath.*

These general views, as to continuances, contain within them the principles by which we have been controlled in our decision upon the first assignment.

On the 27th January, 1868, in a rencounter with Womack, who was killed by him, Whitley, the plaintiff in error, received two pistol-shot wounds, one through the body, the other through the thigh and testicles. He was at once arrested, and kept closely confined in jail—guarded and denied intercourse with his friends. On the 19th February, 1868, twenty-three days after the homicide, he was arraigned, and required to announce whether he was ready for trial. He said he was not, and moved the Court to continue the case for the purpose of preparing his defence. He made an affidavit, and stated therein, whilst in jail, he had not been able to make inquiries for persons who had seen the difficulty, there having been many in town that day; that from the wounds he had received, he had not sufficiently recovered to enable him to endure the fatigue and excitement of a trial, having suffered great bodily pain, etc. The affidavit of Dr. Galloway, the attending surgeon of Whitley, was also submitted. The surgeon testified that he would not say that the accused might not stand his trial without serious injury; but he thought that serious consequences might arise, and that he did not think it prudent that Whitley should go to trial in his present bodily condition, though the wounds had nearly healed. The motion for a continuance was overruled. We think, if there ever was a case in which such a motion should have been promptly granted, this was the case. This refusal entitles the plaintiff in error to a new trial.

2. The second assignment of error is, that the Judge over-

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ruled the challenge of the accused to the array of the *second* panel, for that *eight* of the panel of jurors were negroes, who were not, by the law of Georgia, competent to serve as jurors. The Judge, in overruling the challenge, stated he was acting, in doing so, *only* in obedience to military orders. By agreement between the Solicitor-General and counsel for the accused, *the negroes were excused from service*, the Judge assenting. The panel thus relieved from the objectionable persons summoned by the sheriff as jurors, was proceeded with without other objection. The assent to go on with the remaining persons, can be regarded only as a waiver to the challenge to the array, and this ground should not, therefore, have been included in the bill of exceptions. We, therefore, refrain from the expression of *any opinion* as to the sufficiency of a military order of a department commander, under what are called "the Reconstruction Acts," to make persons competent to sit as jurors, *who are not competent by the laws of the State*.

3. The third assignment is as to the admission of the following words as the *dying declarations* of Wommack, "that it was hard to be killed for telling the truth; that God knew that he (Wommack) told the truth, and Eg. knew it was the truth." The objection was, that they disclosed no *fact* as to the relations of the parties to the rencounter, or connected with it. We apprehend there is a decisive test to which "dying declarations" must be subjected, and by it their admissibility as testimony can be readily determined. That test is, *whatever* may be stated by a witness under oath, is admissible in evidence as dying declarations, made by one under the consciousness of approaching death. The statement, under such circumstances, is held to be as truthful as if under oath, and equivalent to a statement *sworn* to. But the *opinions* of witnesses under oath, as a general rule, are inadmissible in evidence in *criminal cases*, and hence opinions in *dying declarations* are excluded. In the case of Sellers, cited in Roscoe Criminal Evidence, pp. 27, 28, it was ruled that the dying declarations of *opinions* and *inferences*, without facts, could not be given in evidence, and that, like witnesses, the

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declarations must be confined to circumstances which caused the death, or facts having a distinct relation to it. We are, therefore of the opinion that the Judge erred in not rejecting the sayings of Wommack as incompetent testimony.

Error has also been assigned upon portions of the charge made to the jury, viz: "that the charge is upon a hypothetical statement of facts, not warranted by the testimony, which testimony involved the guilt of the prisoner, and that they decided, in almost every instance, from the consideration of every hypothesis of the defendant's innocence or guilt, and every hypothesis that might reduce the crime from murder to manslaughter." The portions objected to are in the following words: "If you shall be satisfied, from the evidence, beyond a reasonable doubt, that the deceased deliberately determined to assail the deceased with the purpose of taking his life or doing him some grievous injury, and the deceased knew the fact, and that in the encounter with defendant, he was acting in self-defence, no difference whether he fired the first shot or not, and that he had in that instance a perfect right to destroy his assailant to preserve himself, and if his resistance was overcome, and the defendant succeeded in carrying out his original purpose and killed the deceased, then it would be murder, notwithstanding the deceased had prepared a weapon and endeavored to destroy his assailant to save himself."

Objection: "If your minds are satisfied, beyond a reasonable doubt, that defendant was armed with a deadly weapon, and was pursuing the deceased with threats of vengeance, and that the deceased knew these facts, he had a right to arm himself and to resist the assailant and preserve himself, and his attempt to do so, and failing, is no justification for defendant."

Think these portions of the charges liable to the exception made to them. They assume, as in testimony, every fact which is essential to fix the guilt of the accused as a murderer, and everything which could excuse the deceased, and the conduct throughout as entirely justifiable; the legal principles are applied by the Judge to such assumed facts. The minds were thus made to look through the testi-

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mony for such facts as would produce a verdict of *guilty* without, in any wise, instructing them to look to those *positions* of the testimony, which, when analyzed and carefully considered, might induce a *rational* doubt whether Whitley had formed any deliberate intention to take Wommack's life. The threats of vengeance used by Whitley were *indefinite*. The jury should have been instructed to draw their inferences to what they meant, by weighing the words and circumstances under which they were uttered, and in connexion with his conduct *then* and *afterwards*. That Wommack was *pursued* by Whitley, with a deadly purpose, is also *assumed*. The testimony does not show clearly, and without reasonable doubt, *any pursuit* at all. The rencounter may have been an accidental casualty of two hostile parties brought together without the occurrence being sought; and this is a *view*, which, if the testimony will authorize such a conclusion, would have been an important consideration in ascertaining the degree of guilt of the respective parties.

It was also *assumed* that Whitley was the *assailant*, and the law arising upon such a fact was strongly stated. The testimony shews no *assault at any time* on Wommack. When Whitley approached Wommack on the sidewalk, where the rencounter took place, he was bid by Wommack not to advance; Whitley continuing to walk forward, Wommack drew his pistol, cocked it, and fired first; Whitley, when advancing, having no weapon in hand, making no threat, nor making any assault whatever. If, then, Whitley did not make any assault, then it became an inquiry, which the jury should have made, and to which the charge should have directed their attention, whether or not the parties, having hostile feelings towards each other, had not, without agreement or premeditation, been brought suddenly together, and, their passions inflamed thereby, engaged in mutual combat; and if they should regard the rencounter as casual, the parties being on equal terms, notwithstanding their previous differences, the law, in its tenderness to those who act under sudden violence of passion, would not have reduced the offence to manslaughter. There are other assumptions of fact, as in testimony,

which might be pointed out, but as they are of minor importance we omit to notice them.

In every form in which the facts assumed by the Judge to be in testimony have been grouped together, with the intention of shewing what legal principles they involved, it strikes us that they were so presented as to admit of the jury reaching but two conclusions, viz: the guilt of murder in Whitley, and the entire justification of Wommack, when it is very questionable whether either would be a fair result from a full consideration of the *whole* testimony. The oftener we read the charge of the Judge, as contained in the bill of exceptions, the more deeply are we impressed with the conviction that it is violative of the spirit, if not the letter, of our Code, section 3183. By that paragraph, a Judge is not only prohibited from the expression of an opinion as to *what facts* have been proved, or as to the *guilt* of the accused, but he is also prohibited from an *intimation* of opinion as to either the one or the other. Had we been in the jury box, and addressed as it was by the Judge, it would have been impossible for us to have understood him otherwise than as conveying the idea that what he had stated were facts sworn to in the testimony, and that if we believed them to be true, then that Whitley was guilty of murder. The charge was, it appears to us, an intimation, or indirect suggestion, conveying to the mind, covertly but effectually, that the facts of the case were as he had stated them, and that they necessarily made defendant guilty; nor did the addition, that if the jury were satisfied of their truth, beyond a reasonable doubt, lessen or remove the effect of the impression made on their minds, that he believed the facts.

A charge from such a source, from a Judge commanding the confidence of all who know him, for the high attributes of integrity, ability and personal worth, could but have carried along with it to the jury, the impression it makes on us. If it had been intended, (which we will, by no means, impute,) to produce a verdict of guilty, we apprehend a more effectual mode, to assure such an end, could not have been pursued; indeed, it well merits the appellation of "a hanging charge."

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In England, such a mode of charging would probably be unexceptionable; for the Judges there are accustomed "to sum up," or in other words, to comment temperately upon the testimony; state what appears to be proved, and what not proved; the value of particular facts, as also of them combined, and the result they should produce. This course, and it is *authorized* there, has necessarily, a weight with the jury, proportionate to the dignity, learning, impartiality and honest intentions of the magistrate, and is almost always decisive in giving direction to the verdict.

However valuable the assistance thus given to juries in England, in enabling them to perform intelligently their duties, such a course is *wholly unwarranted* by the laws of Georgia to its Judges.

By a jealousy, which has no foundation for its existence in a republican government, our Judges have been prohibited from the discharge of those duties which would seem most appropriately to belong to them in criminal trials, and have been made little else than mere *automata*, or why have juries been made alone the judges, not simply of the facts, but of the law governing them? Why otherwise, are the Judges prohibited from directly or indirectly expressing or intimating any opinion as to what facts are proved, or what facts in the case establish guilt?

Our experience on the circuit bench, makes us very sensible of the difficulty of making charges unexceptionable and free from violations of the Code, but we are persuaded it can be done by the Judge avoiding the slightest reference to the testimony, hypothetically or otherwise, and confining the instructions given to a statement of *what facts* are essential to bring a case within the crime alleged or involved in the indictment.

He should not be betrayed, by his zeal for the efficient administration of the criminal justice of the State, to throw directly or indirectly the influence and weight of his opinions into the scale. The Act intended, after he had *charged the law*, that he should no further have any connexion with the case; his duty then ceased.

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~~We~~ must all obey its clear and unmistakable requirements, and never fears we may entertain as to the effect of this restriction upon the Judges in charging the juries, the consequences, never they may be, cannot be ascribed to those who obey; they will, if they should prove injurious, probably satisfy people that they are not imputable, in any degree, to the ~~interests~~ of the law, but to the *law* itself. The verdict in ~~case~~ is the fruit of a charge which involves a violation ~~of~~; and if this had been the only ground of error ~~in~~, the plaintiff in error would, on it, have been entitled to a new trial.

judgment reversed.

WILLIAM H. CARUTHERS and WIFE, plaintiffs in error,
HENRY L. CORBIN, executor, *et al.*, defendants in error.

the laws of South Carolina, as they existed in 1835, a will practicing emancipating slaves was invalid, so far as such object was concerned; but other bequests, in the same will, were not affected thereby. laws will not enforce the provisions of a will, made in another State, which are directly contrary to the declared policy of this State; the judgment of a competent tribunal, as to such will, where the will was executed, will be respected by the Courts of this State.

debts due by a deceased executor, administrator, guardian or trustee, as to priority of payment, in the administration of assets, as provided by the Code, sec. 2312, and par. 4 of sec. 2494, are such only as may be due by persons appointed by the laws of this State. Trustees appointed in other States are not embraced. Debts due by foreign creditors, trustees, etc., are to be paid, according to their character, as for accounts, etc., the same as if owing by others, without any liability on account of such character. HARRIS, JUDGE, dissenting.

a creditor receive, in payment of his debt, a depreciated currency of nominal value, without fraud or mistake, he will be bound by such payment.

an administrator or executor pay debts of an estate with less than he is entitled to upon them, he shall not take the benefit of it himself; but the creditors and legatees shall have the advantage of it. The estate is entitled to all the benefits arising from such payment, and not the administrator personally.

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The full statement of these cases, in the opinion of J. Walker, renders a report of them unnecessary. It was up for a time.

Brief of points made, and authorities submitted by C. & JACKSON and SAMUEL HALL, counsel for John J. Corbin and Alexander G. Lane and wife:

I. Mrs. Parr having died in the lifetime of Mrs. Corbin, leaving no issue living at her death, there are, by the express terms of the 6th item of John J. Saylor's will, cross-positions between the issue of the said Mrs. Parr and Mrs. Corbin, and the children of Mrs. Corbin are entitled to the property that went into Mrs. Parr's hands from the estate of John J. Saylor. The estate was to be kept together and managed until the death of the last of testator's brothers and sisters, when one-sixth or one-twelfth part of it was to be conveyed to the children of his brother, by the trustees; and then it provides, "that they (the trustees) will convey to the said residue of my estate, say five-sixths or eleven-twelfths, (as the case may be,) unto the children of my two sisters, say to such children or CHILD of my said sisters AS MAY BE ALIVE AT THE DEATH OF THE SURVIVOR OF THEM, the said *Mary, Marcella Caroline* and *Samuel*. I mean that one moiety, or half of the five-sixths or eleven-twelfths of said balance or residue, shall be conveyed to the child or children of my sister, Mary Parr, THEN alive, and share alike; and the other moiety, or half of said five-sixths or eleven-twelfths of said residue or balance of estate, to the children or child of my sister, *Marcella Caroline Corbin*, share and share alike."

In order to arrive at the intention of a testator, and to give effect to the same, as far as is consistent with the rule of law, the Court, in the construction of wills, may transpose sentences or clauses, change connecting conjunction, or supply omitted words. Code, sec. 2424. These sentences transposed, would read thus: "One moiety of the five-sixths or eleven-twelfths of the residue of my estate shall be conveyed to the child or children of my sister, Mary Parr, alive at the death of the survivor of my said sisters

ther, and the other moiety thereof to the child or children
my sister, Marcella Caroline, THEN alive. The whole
idue, say five-sixths or eleven-twelfths, (as the case may
of my estate, to be conveyed unto the children of my
two sisters, say to such children or CHILD of my said
sisters, as may be alive at the death of the survivor of
the said Mary, Marcella Caroline, and Samuel S."

The offspring of these two sisters alive at the death of the
vivor of the testator's brother and sisters, were the pref-
able objects of his bounty, and it matters not whether they
are the offspring of one sister or both. If only one had
spring living, that offspring was to take the whole five-
ths or eleven-twelfths; if offspring of both was *then* alive,
his residue was to be divided among them *per stirpes* and
per capita, share and share alike. And this the testator
said in terms, or thought he had said in terms, else, why,
then providing for the failure of his brother's issue upon
the happening of the contingency on which the the *corpus*
of the property was to be conveyed, does he make this pro-
vision? "But if my brother die leaving no child alive, or if
leaves a child, and that child shall die leaving no issue, my
will is, that the provision above made for my brother's child
or children shall revert and become a part of my residuary
estate, and be disposed of to my sisters and their children,
as is above provided," etc.

II. If cross-limitations do not exist, by express words,
between the children of Mrs. Parr and Mrs. Corbin, then
to effectuate the intention of the testator, they are to be
construed by "necessary implication," "plain intention," or
"evident demonstration."

For the general doctrine of estates by implication and
cross-remainders, the Court is referred to 2 Blackstone's
Com., 381, 382; Ken's Ed., 388, 389.

As to meaning of "necessary implication" and equivalent
terms, see per Lord Eldon, 1 Roper on Leg., 84. Ib., 724;
per Lord Mansfield, 1 Fearne on Rem. Appendix iii, 589,
Jones vs. Morgan; per Lumpkin, C. J., 12 Ga. R., 155,
Wright vs. Hicks.

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Cross-remainders among tenants in tail take place "under the necessary implication" under the following circumstances:

1st. Under a devise to several persons in tail, being tenants in common, with a limitation over for want, or in default of such issue, cross-remainders are to be implied among the devisees.

2d. This rule applies whether the devise be to two persons or a larger number, though it be made to them respectively, etc.

3rd. The rule applies with regard to executory trusts, at least, though there be an express direction to insert cross-remainders among another class of objects, or a limitation over among some of the same objects, and even in direct devises, an express limitation of cross-remainders among another class of objects, has been held not to repel the implication.

4th. The word *remainder* following a devise to several in tail will raise cross-remainders among them. 2 Jarman on Wills, 379.

5th. But the occurrence of this, or some tantamount expression, is not indispensable to the result. The intention of the testator may be implied from other circumstances. Hobart, 34, citing Year Book 7, E. 6; 6 Bacon Ab. Testaments and Legacies and Devises, (J.), p. 107.

6th. When an intention appears from the will that another person shall inherit any portion of the estate, or take it by way of remainder, so long as any of the immediate devisees or any of their issue are living, cross-remainders will be implied. Bacon Ab. *ut. Sap.*, p. 108; 3 Greenleaf on Wills, 412, Note 2; 4 Day, 368-372, *Hungerford vs. Anderson*; Dyer 303, b. pl. 49; 2 Bailey, 442, *Baldrick vs. White*; 4 S. & R., 368, *Simpson vs. Coon*; 2 Hal., 41, *Doe vs. Cook*; 2 Bing., N. C., 422, *Brook vs. Turner*; 5 Metcalf, 134, *Parker vs. Parker*.

7th. Cross-limitations take place among legatees or devisees in fee where even the title is to vest upon a contingency, and the contingency does not happen in time for the title to vest, and the intention of the testator would be defeated if the

implication was not made. 2 Pierre Will, 68, Scott vs. Bargeman; 2 Jarman on Wills, 481, 483; Ves., 236, 536, Mackell vs. Winter; 3 Mer., 334, Skey vs. Barnes; 4 Beav., 117, Currie vs. Gould; 2 Jarman on Wills, 487; 2 Roper Leg., 1439, *et seq.*

8th. The property did not vest in this case until the death of the last survivor of the sisters and brothers of the testator, and so literal a fulfillment of the conditions upon which it was to vest, is not required, as would be to divest it where it has once vested. Shepperd's Touchstone, 133.

9th. The vesting of the property depended upon a contingency which rendered it uncertain who would be the legatees, and this makes the legacy contingent. 2 Bla. Com., 169; 1 Fearne Rem., 3, 381; Lewis on Perp., 72, 56. The trust is executory as well as contingent, and for that reason must receive an indulgent construction. 2 Blackstone's Com., 381, 382, Jones vs. Morgan; 1 Fearne Rem. App. iii, Edmonson and Wife vs. Dyson; 2 Kelly, 307, 312, 313, 314; Fearne Rem., 185, Earl of Stamford vs. Sir John Hobart cited and commented on; Fearne on Rem., 117-120, 338.

III. S. P. Corbin held this property in trust, and was a naked trustee, and responsible as such. Lewin on Trusts, 243, Byrchall and Wife vs. Bradford *et al.*; 6 Madd. Ch. R., 241, Dix vs. Benford; 19 Beav., 401, cited by Lewin, 243; Hill on Trustees, 214, 215; Lewin, 242, citing Conyngham vs. Conyngham; 1 Ves., 522, and Montgomery vs. Johnson, 11 Iredell's Eq., 476.

IV. But whether he held, as administrator or trustee, the debt of the *cestui que trusts* is a preferred one. Code, sec., 2496 par. 4.

V. The defendants, John J. Corbin and Lane's wife, not being *in esse* at the rendition of the decree by the Court of Chancery in Lexington District, South Carolina, in favor of Corbin and Wife vs. Mrs. Parr and the other legatees under John J. Saylor's will, are not bound thereby. Huson vs. Wallace; 1 Richardson's Eq., 1; 1 Daniell's Ch. Pr., 90, 95, 207. And if they were, that decree interferes with none of the rights or trusts under that will.

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VI. The change of property, ordered by that decree, left untouched the rights of the legatees under the will. *Lewin on Trusts*, 274. The *cestui que trust* could follow the property into which it is converted, and impose the trust upon all profits derived from the conversion, and that whether mixed with the property of the trustee or kept separate. *Dockers vs. Somers*, 2 M. & K., 655, (1 W. & T. Lea Cas., 347;) *Fellows vs. Mitchell*, 1 P. Williams, 83, *Lewin*, 337; *Lupton vs. White*, 15 Ves., 420; Code, secs, 2310, 2315, *Lewin*, 753; *Taylor vs. Plumer*, 3 M. & S., 562; *Pennell vs. Deffell*, 23 Eng., L. and Eq. R., 460; *Conard vs. Atlantic Ins. & Trust Co.*, 1 Peters, 386; *Nathan vs. Giles*, 5 Taunt (1 E. C. L. R.)

VII. The children of S. P. Corbin have to be advanced in proportion to the amounts received by Caruthers and wife from his executor; *Dyose vs. Dyose*, 1 P. Williams, 305; *Humphreys vs. Humphreys*, 2 Cox C. C., 184, 185, 186.

VIII. S. P. Corbin being trustee, was liable for all that came into his hands from Saylor's estate, whether he received it as trustee or in any other capacity. *Lewin on Trusts*, 326-330.

IX. Under the laws of South Carolina, as they existed when Saylor's will took effect, the clauses thereof, in relation to the manumission of the slaves, were valid. *Lenoir vs. Sylvester*, 1 Bailey, 632; *Gordon vs. Blackman*, 1 Rich. Eq., 65, S. C.; 2 Ib. 43; *Frazier vs. Frazier*, 2 Hill's Ch. R., 304.

X. But whether these clauses are valid or not, no benefit can inure to testator's heirs at law, for there is a valid disposition over to strangers. 1 Richardson's Eq. R., 63, *Gordon vs. Blackman*, S. C.; 2 Richardson's Eq. R., 45; 2 McCord C. R., 269, *Hall vs. Hall*; 2 McMullen, 454, *Carmille vs. Wightman*; 15 Ves., 417, *Dawson vs. Clarke*; 2 Ves., Jr., 284, Note 6; *Pickering vs. Lord Stamford*; 8 Ib., 12 *Cambridge vs. Rous*; 12 Ga. R., 163, *Wright vs. Hicks*.

XI. Corbin purchased the negroes at the sale of Saylor's estate, with the trust funds, but made such purchase on his own responsibility—took the titles in himself—used

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roes, and disposed of them as his own property, as a conversion; and he thereby became responsible *tui que trusts* for the amount of trust funds, with in the same from the death of Mrs. Corbin, and not r the hire of the negroes, as reported by the Master ery, and affirmed by the Court below.

We are entitled to recover interest on the portion from Mrs. Parr, from her death, in 1848, and not death of Mrs. Corbin, as reported by the Master.

subsequently submitted another brief, as follows:

question upon which a portion of the Court, as we are, hesitates in this case, and which we do not remember been suggested on the argument, and which was not discussed, is this: The trusts being created in of South Carolina, and the trustee having removed settled in, Georgia, (bringing with him the trust) where he died indebted to the trust estate, and his ing administered here, (the *cestui que trust* being and at the death of the trustee, also citizens of) do they take under the law of this State regulating r of the payment of deceased persons' debts, as pre- merely as simple contract, creditors?

think the following propositions are clearly deducible authorities:

That the law appointing the order in which distribu- l be made, is local in its operation and has no extra d force; and, therefore, if the laws of South Caro- secured priority in this respect to the *cestui que trust*, vision would not have been observed if the adminis- ms taken out in Georgia and the distribution made

It follows that the law of the place where the admin- taken is to be observed in the order of distribu- ed by that law.

It is the result of two well settled principles: 1st. of distribution of the place where the contract was made, where it was contemplated it should be execu- of the contract, but is a part of the remedy.

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These laws belong to the proceedings in suit, (*ad litis nationem*,) not to the merits of the claim (*ad litis decisionem*). And 2d. Because comity does not require the observance of the laws of a foreign jurisdiction, where such laws interfere with the settled policy of the country, of the tribunal appealed to, for the enforcement of the demand or collection of debts.

4th. Because the foreign creditor is entitled to all the effects of the remedy to which any other creditor is entitled, unless he shall be expressly or impliedly excluded therefrom by the law affording the remedy.

5th. These general principles are applicable to liens, hypothecations and priorities given to creditors by the law of particular countries as well as to other claims.

As to the first, second and third propositions, *Harrison vs. Story*, 5 Cranch, 299. *Smith, adm'r vs. Union Bank of Georgetown*, 5 Peter's R., 518. *McElmoyle vs. Cohen*, 13 Peters, 328. *Ten Eyck vs. Ten Eyck*, ———. *Morton vs. Morton*, C. Burney, 36. *Potter vs. Brown*, 5th East, 131. *Story on C. of L.*, secs. 524, 525, 575 *et seq.*, and 323, 339, (edition of 1846,) and the Code of Georgia, sec. 2 pr. 4.

B. HILL and WALLACE for Caruthers and Wife.

WALKER, J.

In 1834, John J. Saylor, then of Lexington District, South Carolina, made his will, and died, in South Carolina pretty soon thereafter, say in 1835. By this will he provided for the practical emancipation of six certain favorite slaves and made sundry bequests in their favor. The bulk of his property was left to his brother and sisters, during life, and at their death to their children. The leading object of the will was to secure the practical or actual emancipation of the favorite slaves, if possible; and the other bequests were made conditional upon all the beneficiaries under the will aiding to effectuate this object. After making certain specific bequests which disposed of but a comparatively small

portion of the estate, he devises, in the sixth item, to trustees, the residue of his estate, both real and personal, to be held in trust for the benefit of testator's sisters, Mary Parr and Marcella Caroline Corbin, (wife of Samuel Peter Corbin,) and his brother, Samuel S. Saylor, in the following proportions: say one sixth of the annual income arising from such residue for the benefit of said brother during his life; and the remaining five-sixths of such income for the use of said two sisters during their natural lives. After the death of the brother and sisters, said trustees were to convey one-sixth of said residuum to the children of the brother, should he die leaving more than one, share and share alike; but if he should leave but one child, him surviving, then but one-twelfth of said residue should be conveyed to such child; the trustees were to convey the balance of said residue, say five-sixths or eleven-twelfths, (as the case may be,) to the children of said two sisters, (say to such children or child of said two sisters as may be alive at the death of the survivor of the sisters.) "I mean that one moiety, or half of the said five-sixths or eleven-twelfths of the said residue, or balance of my said estate, shall be conveyed unto the child or children of my said sister, Mary Parr, then alive, share and share alike; and the other moiety or half of said five-sixths or eleven-twelfths of the said residue, or balance of my estate, unto the child or children of my sister, Marcella Caroline Corbin, share and share alike." The increase of the estate was intended to be included, subject to the limitations, conditions, and restrictions specified in relation to the six favorite negroes, "which conveyances shall become null and void, if the intentions of my will, in relation to my said servants, shall be opposed or neglected by the persons thus taking said property." The will further provided, that if either the brother or sisters should die, leaving a child or children, such child should take the share which the parent would have taken if alive; and, in order to dispose of the same, until the death of the last surviving sister or brother, it was provided, that if the brother should die first, one-sixth of the annual income, until the death of the last survi-

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ving sister, should be paid to his children, if more than one; if only one, then one-twelfth; but if one of the sisters should die, her children should take their mother's share, until the death of the last survivor of the three; if the brother should die leaving no child, the provision made for his child or children was to revert, and become a part of the residuary estate, to be disposed of as provided for the sisters and their children. The property was not to be subject to the debts of the brother or sisters, or the husbands of the sisters. If any beneficiary should oppose the intention of the testator relative to said six favorite slaves, the portion which would come, under said will, to such person opposing said intention, was devised to the Theological Seminary of the Lutheran Church of South Carolina, provided said corporation would carry out his desires; and if said church would not do so, then such portion was devised over to the Commissioners of the Free Schools for Lexington District, who were to become trustees to carry out testator's intentions in regard to said six negroes. The will imposed certain duties on the trustees in relation to the care and management of certain portions of the property, for the use of said six negroes, which must necessarily have continued for a long series of years, and was such "a troublesome office" that the trustees declined to act.

Samuel D. Corbin, the husband of Mrs. Marcella C. Corbin, was appointed by the proper court to carry out the provisions of the will, and meeting with difficulties, filed a bill in the Courts of South Carolina, for the distribution of the estate among the legatees, according to their respective shares under the will. Chancellor Johnson, before whom the case was heard, refused to grant the prayer of the bill, on the ground that to do so "would be making a will for the testator, a power which this Court disdains," and he dismissed the bill. This ruling was excepted to, and the Supreme Court of South Carolina reversed the decision of the Chancellor, and thereupon a division of the property was had, under the direction of the Court of Chancery. This division took place about January, 1840. In the division, the children of Samuel Saylor received one-sixth of the residuum of

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estate, (the specific devises in favor of said six negroes being strictly carried out,) and the other five-sixths being equally divided between Mrs. Parr and Mrs. Corbin. The whole transaction seems to have been treated by the Court and the parties as a final distribution and settlement of the affairs of the estate of John J. Saylor. The negroes were provided for, according to the terms of his will; and the residue of his property was divided between his sisters and the children of his brother, in the proportion he had intended. The division, however, took place during the lives of the sisters, and not after their deaths, as the testator intended that it should. His brother was dead. The negroes were sold for distribution, and Samuel P. Corbin purchased just about as many of them as were coming to his wife and children, and brought them to Georgia, and kept them until his death, and they remained in the hands of his executor until they were emancipated. Samuel P. Corbin died in Taylor county, Georgia, about the latter part of November, 1862, having executed a will, appointing his brother, Henry L. Corbin, as his executor, who qualified as such, and filed a bill for direction, in Crawford Superior Court, alleging the emancipation of the slaves, and the insolvency of the estate in consequence hereof; and praying that the various creditors might be required to prove their demands, that the Court might adjudicate and settle the amount and order of payment of the various claims against the estate, etc. An injunction was granted to restrain the creditors from proceeding at law. During the progress of the case, the whole matter was referred to W. K. deGraffenried, Esq., Master in Chancery, who was directed to report "the state of the account between said Henry L. Corbin and the estate, and between him and said legatees and claimants and creditors," and report his opinions upon all questions of law and fact arising between the parties. Said Master in Chancery proceeded to take the depositions, and made his report to the Court, and the Court, after hearing the exceptions, confirmed the report; and to the judgment affirming the report, various exceptions were taken and brought to this Court.

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We do not propose to notice all the questions made in the record, which is very voluminous, and contains the record of the distribution of Saylor's estate, in South Carolina, the bill filed by Samuel P. Corbin for that purpose, and all the proceedings had therein, then the will of Mrs. Parr, the bill filed to set aside certain devises therein, and the distribution of her estate, with the long accounts of the representatives of that estate, and the testimony taken in these two bills, then the proceedings in relation to the estate belonging to Ella Gray, (now Mrs. Caruthers,) of which Samuel P. Corbin was guardian, and in relation to the actings and doings of the present executor. We will notice those points which we deem material for the adjustment of the rights of the respective parties, in relation to the property belonging to the estate of said Corbin.

1. It was insisted that the will of John J. Saylor, by the laws of South Carolina, was invalid, that it attempted to manumit certain slaves, and was, therefore, null and void. We have looked into the provisions of the laws of South Carolina on this subject, and we think that, so far as the will attempted to emancipate the slaves was concerned, this portion of it, by the laws of that State, as they existed in 1835, was invalid; but other portions of the will were not thereby affected. Consequently, while the provisions of the will, in favor of the practical manumission of the slaves, could not have been enforced, if resisted, yet the other bequests in the will were valid.

2. Again, it was insisted that Saylor's will, being contrary to the then declared policy of the laws of this State, cannot be enforced by our laws, that admitting the will to be valid in all its provisions, according to the laws of South Carolina, yet, to enforce it in Georgia, would be contrary to the policy, and prejudicial to the interests, of this State. Rev. Code, secs. 9 and 2696. We fully recognize the rule here contended for, that this State will not enforce the laws of another State, which contravene the policy of our laws; but this case does not fall within the rule. Here a will was made in South Carolina, which, according to the decision of

best tribunal known to the laws of that State, concerning rights on certain parties, irrespective of the laws which, in our courts, would render the will illegal. We are not called upon to enforce any illegal provisions of the will. The question of emancipation is not, in any way before us. Here is a judgment of our sister State, by a court having jurisdiction of the parties and the subject-matter, and the question is, shall the judgment of that court be respected by our courts? Shall we mete out to the parties the rights which, according to the decision of the Courts of our sister State, they have been decided to be entitled to? Are we called upon to enforce the illegal provisions of this will? In other questions might arise. But such is not the question. The simple question is, whether the judgment of that court shall be respected or not? If that judgment is to be respected, what is the effect? The property of John J. Saylor, as divided by a court of competent jurisdiction, divided under the will; and that judgment must conclude the rights of the parties.

What was the effect of that judgment? It was that one-half of the residue of the five-sixths of the John J. Saylor estate belonged absolutely to Mrs. Corbin and her children, under this will, and the other half to Mrs. Parr and her children, absolutely. There was an administration, and a division of the property, under the will, according to the judgment of a court of competent jurisdiction.

Mrs. Parr survived all her children, and then died, leaving a will, portions of which were set aside by the proper court, and the property divided among her heirs-at-law, Mrs. Parr and Samuel Saylor's children. The portion which P. Corbin received, in right of his wife, from Mrs. Saylor's estate, was received as *heir-at-law*, and not as *legatee* under Saylor's will. Consequently, the property was his, absolutely, without liability to account to any one. The conclusions, to which we come, on this branch of the case, are, that the division made of the Saylor estate by the Court of South Carolina, between Mrs. Parr and Mrs. Corbin, is legal and valid, vesting one portion, or half of the estate in Mrs. Parr and her children, and the other in

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Mrs. Corbin and her children, respectively, according to the division as then made. Each ceased to have any interest in the property allotted to the other; and when the property of Mrs. Parr was paid to Samuel P. Corbin, after her death, it was freed from any trust whatever connected with Saylor's will. Consequently, the children of Samuel P. Corbin have no claim against his estate, on account of the Mrs. Parr half of the five-sixths of the residuum of Saylor's estate, nor on account of the property received from her representatives after her death. They have a claim for the half paid to him in their right, and that of their mother. The negroes willed by Saylor were sold for distribution, and Samuel P. Corbin purchased enough of them to make the portion due his wife and children, or just about enough for that purpose. The sale of the negroes was a method adopted for division, and the negroes received by said Corbin belonged to his wife during her life, and at her death, to her children. The negroes belonged to the wife and children; and when they were emancipated, the loss must fall upon the children, the owners at the time. *Hand vs. Armstrong*, 34 Ga. R., 232.

3. Is the claim of Samuel P. Corbin's children such a debt as to be entitled to a priority of payment in the distribution of the assets of his estate among his creditors? Is it a debt due by the deceased, as executor, administrator or guardian, or as trustee? Rev. Code, sec. 2312, and par. 4, of sec. 2494. It is claimed that Corbin was both executor and trustee in South Carolina, and that, as such, this trust debt must have a higher dignity in the order of the payment of debts than simple contract debts. Is a foreign trustee embraced by the words of the Statute? The original Act was passed, 18th February, 1799. Cobb's Dig., 311 and 288. It is entitled "An Act for the better protection and security of orphans, and their estates." The first section makes it the duty of the Clerks of the Courts of Ordinary to enter in a book the names of all executors, administrators and guardians, appointed in their several counties, with the names of their securities, which book should, at all times, be subject to examination by the Court, or other persons

sted. The second section makes it the duty of such
aries to make returns, showing the conditions of the
s, and authorizes the Court to take such steps as may
ought fit to protect the rights of parties interested.
third requires annual returns of the condition of the
s, and authorizes process to issue against delinquents.
fourth section allows guardians reasonable disbursements
ount of their wards, and authorizes the binding out of
, in case the annual profits of the estate are not suffi-
for the education and maintenance of the wards. Then

the fifth, which says: "When any guardian, executor
nistrator, chargeable with the estate of any orphan or
sed person, to him, her, or them committed, shall die
rgeable, his, her, or their executors or administrators
be compelled to pay out of his, her, or their estate, so
as shall appear to be due to the estate of such orphan
ceased person, before any other debt of such testator or
ate." The word "trustee" is not in this Act. This
mended by the Act of February, 1854, pamph. Acts,
, which amends the before recited Act of 1799, and

"That from and after the passage of this Act, the pro-
as of the fifth section of the above recited Act, be, and
ame are hereby extended, and made applicable to the
s of all trustees in this State, who may have converted
eir own use, wasted, destroyed, or died chargeable to the
s of their *cestui que trusts*; provided said trustees have
he actual possession, control, and management of the
erty vested in them as such." Take the whole of these
Acts together, and is it not most manifest that they apply
nestic, and not to foreign, trustees? The whole scope of
Act of 1799, is in relation to persons appointed by the
of Ordinary, to act in a fiduciary character; and the ob-
the Act was to protect the rights of all persons who had
on the Court for the selection of agents to transact
; and then, by the Act of 1854, the provisions of
ception are "extended and made applicable to the es-
tees in this State." This is a legislative interpreta-
the whole Act intended to apply to domestic trustees,

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to such as are made so by the laws "in this State." Is not the general sense of the words, executors, administrators, etc., applicable to such as are appointed by our own laws? Our laws do not recognize foreign executors, etc., as such, at all; or rather, they did not do so prior to the Act of 1850. Cobb's Dig., 341. (The Rev. Code, secs. 2573-6, now authorizes them to sue in our courts.) See *Davis vs. Smith*, 5 Ga. R., 295; *The South-Western Railroad Company vs. Paulk*, 24 Ga. R., 370; *Vaughan vs. Northup*, 15 Pet. R., 1; Sto. Confl. L., sec. 513; *Jackson vs. Johnson*, 34 Ga. R., 511. As the law did not recognize the existence of foreign trustees, at the time of the passage of the Act of 1799, is not this a strong reason for construing the Act to apply to such persons of the classes named as were recognized by the law as belonging to those classes? We think so, most clearly. We think too, we can see good reasons for allowing this preference as to the estates of domestic trustees, which do not apply to foreign ones.

Samuel P. Corbin died about the 28th November, 1862, and, therefore, before the Code went into effect. This case must be decided according to the provisions of the statutes existing prior to the Code. We think, however, that the same reasons apply to the Code, and that the sections therein must be construed to mean just what the law did previously. See sec. 2312, and par. 4, of sec. 2494. From all which, it follows that the claim of Corbin's children against his estate, is not such a trust debt as is entitled to a priority in the payment of the debts of the estate.

Samuel P. Corbin, in his life time, having been the guardian of Ella Gray, (now Mrs. Caruthers,) appointed in this State, and having died so chargeable, whatever may be found due on this claim is properly entitled to a priority in the payment of the debts, as contemplated by the Statute.

Sundry payments were made to Caruthers and wife in "Confederate Treasury Notes," by the executor. These payments were valid, as against the parties receiving them. Caruthers and wife were competent to contract for, and receive in payment, anything that might be agreed upon by

them and the debtor. *Freeman vs. Bass*, 34 Ga. R., 364. The amounts received by Caruthers and wife as payments, must be charged against them, in a settlement of the estate, at the nominal amount so received. They agreed so to receive the currency, and must be bound by their agreement.

As between the executor and the estate, the executor cannot advance his own "Confederate notes" in payment of the debts of the estate, and be allowed on settlement, the full nominal amount, notwithstanding the "notes" were worth but five cents in the dollar. The executor must account for all the profits which have accrued in his time on account of the estate. If he compounds debts or mortgages, or buys them in for less than is due upon them, he shall not take the benefit of it himself, but other creditors and legatees shall have the advantage of it. If an executor take upon himself to act with regard to the testator's property, in any other manner than the trust requires, if there be a loss, he must replace it; and any gain will be for the benefit of the *cestui que trust*. 2 Hill on Ex., 1566-7. It is his duty to act for the best interests of the estate, and whatever he can save in managing the business of the estate shall go to the beneficiaries under the will.—Ib. He can not use his trust to promote his own personal interest.

It was insisted that the money belonging to Mrs. Corbin and children was paid for the Crowell place, and the children seek to follow their funds into this land, and claim the land. There is no doubt about the right of a beneficiary of a trust estate to follow the funds wherever they can be traced, and affirm or reject any unauthorized investment by the trustee. Rev. Code, sec. 2307; 2 Hill. on Ex., 1765.

But here the Master has found against this claim, and we can not say that his decision is so strongly and decidedly against the weight of the evidence as to require us to reverse his ruling on this point. To authorize the taking of property purchased in the name of the trustee, it should clearly appear that the trust funds were appropriated to the purpose of the purchase. 2 Hill. on Ex., 1765. The proof in this case does not come up to this rule.

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The same may be said as to the items for the board of Ella Gray, and for amounts paid for overseer's wages on Ell Gray's plantation. We can not say that the report of the Master on these items is decidedly and strongly against the weight of the evidence. The rule laid down by the Master of taking the highest estimate of the value of cotton in the year of production, and the largest size bales, in making the amount against S. P. Corbin, as guardian, is pretty stringent; but, perhaps, it would be wrong, in a case like this, to adopt a more lenient one. Here the guardian failed to make the returns required by law, and thus neglected his duty. He had the means necessary, and the law made it his duty to show the true amount which came into his hands. Failing to do so, he was in default, and under the circumstances perhaps, it would not be well to lay down a different rule.

We have thus noticed all the points we deem material in these cross bills of exceptions, and laid down the rules which should govern in ascertaining the rights of the respective parties. We reverse the judgment on the grounds intimated in this opinion.

Judgment reversed.

WARNER, C. J., concurred, but wrote out no opinion.

HARRIS, J., dissenting.

I was disposed to adopt the very elaborate and, in general, satisfactory report of the Master in Chancery, of the Mac circuit, and which was approved by the Judge thereof; and to make our judgment, in these cases, conform to its conclusions, but my associates not assenting to, but rejecting, the entirely, imposes upon me the necessity of putting my dissent in writing, to one, at least, of the *points* ruled by my associates, and which is contained in the following summary prepared by one of them, viz: "Debts, due by a deceased executor, administrator, guardian, or trustee, entitled to priority of payment in the administration of assets, as provided by the Code, sec. 2312, and 4th part of the paragraph 249 are such only as may be due by such executor, etc., as may

be appointed by the laws of this State; trustees appointed in other States are not embraced. Debts, due by foreign executors, trustees, etc., are to be paid according to their character, as bonds, accounts, etc., the same as if owing by others, without priority on account of such character."

The record shows that Samuel P. Corbin, now deceased, late of Taylor county, Georgia, many years since, under the will of Saylor, of South Carolina, and by a decree of Chancery of that State, as trustee for his children, John J. Corbin and others, parties to one of the foregoing suits, received a large property, mostly in money, and that, removing immediately thereafter to Georgia, he brought with him said property, and that it remained in the possession, control and management of said Samuel until his death, in 1863. The record further shews, that two of the *cestui que trusts*, his children, were born in Georgia, since the removal of said Samuel to this State, with the trust property, that they are citizens of this State, and further, that said Samuel died in Georgia, insolvent, and deeply involved in debt, without having delivered to said *cestui que trusts* their property, or paid them an equivalent therefor, or, in any manner having accounted to them.

The amount with which he died chargeable to the *cestui que trusts* is ascertained by the Master's report, which I adopt for the purposes of this opinion.

The question, upon the facts stated, then, is whether the *cestui que trusts* have a right, as against Henry Corbin, executor of said Samuel P. Corbin, to have the amount due to them, paid *before* other liens or claims, or debts due by Samuel P. Corbin?

I take it to be clear, that if the property of the children of Samuel P. Corbin, in his hands, as their trustee under the will of Saylor, and which was delivered to him under the decree of Chancery, had been found, upon the death of said Samuel, in Georgia, in kind, and capable of identification as trust property, the individual creditors of said Samuel, as to his contracts with them, could not, to any extent, or in

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any mode whatever, have subjected that trust property to the payment of their demands.

The plain and unanswerable reason for this position is, that it was not *his* property, but his *children's*; nor would a Court of Equity stop for a moment to ask *where* the trust originated, as its acknowledged jurisdiction covered all trusts, and brought all trustees living on the soil of Georgia within the scope of its remedial powers. If the trustee was alive, and a bill was filed against him, at the instance or in behalf of the *cestui que trusts*, to account for the trust property received by him, to discover how and when and into what it had been converted by him, or in what manner he had mixed it with, and used it as, his own, alleging the insolvency of the trustee, it is believed that his individual creditors, whether by judgment or otherwise, would be promptly enjoined, by a Court of Equity, from any attempt to cause the property of which he was in possession to be appropriated to their demands, *until* the trust property in his hands should have been separated from his *own* property, and paid over to *cestui que trusts*; or failing to accomplish that, from a conversion by him of the money, or other thing, so that it could not be clearly traced, *such trustee would be decreed to pay an equivalent* to the extent of the property converted or mixed up with his own, and by which the bulk of his apparent property had been increased, and this *before such individual creditors could be paid*, they being turned over for payment upon the *residue* in the trustee's hands, that being in truth and right *his* property, and *no more*. This principle of the restoration of property to its owner, unaffected by the personal contracts or debts of the person having it in possession as a fiduciary, is of universal application, and is maintained and enforced by Courts of Equity where the trustee has obliterated all means of identification, or mixed it, so that it is impracticable to separate it, specifically, from his own, in the form above indicated, that of withdrawing an equivalent in value from the bulk of the property in possession of the trustee, inaccurately called his property or estate. So that whether the trustee is living or dead, a Court of Equity employs the same means to cause

right to be done. Is it not palpable that, without the exercise of such power, the fraud or misconduct of a trustee would operate to his benefit, and most injuriously to *cestui que trusts*, by subjecting *their* property to pay *his* individual debts?

Our Legislature have not left the subject of trustees, and the liability of their estates, where they die chargeable, to rest upon the course of Courts of Equity, when applied to by individuals, but have declared a principle of justice in comprehensive, unequivocal language, that all may know their rights and liabilities, and especially that executors and administrators may know their duties in the distribution of assets which may come to their hands, without resorting to a Court of Equity for direction.

Thus, by paragraph 2312 of the Code, it is enacted that the estate of a trustee dying, *chargeable with trust funds in hand, shall be appropriated first to the payment of such indebtedness, after the funeral expenses, in preference to all other liens or claims whatever.*

By paragraph 2494, under the head "of managing the estate and paying the debts of testators and intestates," the following order of payment by executors and administrators is prescribed: 1st. Funeral expences. 2d. Necessary expences of administration. 3d. Taxes. 4th. *Any* debt due by deceased as trustee, he having had actual possession, control and management of the trust property.

It cannot be questioned that the bulk of the property in the possession of Samuel P. Corbin, at his death, had been augmented by the addition to his own of the property of his children, in his hands, as their trustee.

Now I have shown that a Court of Equity, independent of our statutes, and by its mode of procedure, for the purpose of doing justice when applied to, reduces the bulk of property in the hands of the trustee, to its rightful and legitimate size, and then subjects *that residue* to the payment of the creditors of the trustee upon his personal contracts.

In *Watson vs. Watson*, 1 Ga. R., 271, which was a case against the estate of a guardian who had sold the land and negroes of his ward, and mixed up the proceeds with his

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own estate, I find Judge Warner saying: "The estate of Watson having been increased to the extent of the value of their (complainants') property, sold by him as their guardian, it is *nothing but sheer justice*, that the claim of plaintiffs be paid first out of it before any other debt." Again, "this statute," (of 1799,) "giving priority, is, in our judgment, *founded on a clear equity.*"

I entirely concur in the soundness of the views thus expressed, and ask, is it not true here that the estate of Samuel P. Corbin was increased to the extent of the property of the *cestui que trusts*, and can it be anything but "*sheer justice*" that their claims shall be first paid out of the property in the hands of Henry L. Corbin, as the executor of Samuel P. Corbin, the deceased trustee? I apprehend my learned colleague will find it no easy task to distinguish, substantially, between "the sheer justice" which afforded relief in the one case, and refused it in the other. The only difference is in the name: one is a guardian, the other a trustee. But in equity, what does a name amount to? *Both are trustees.* We are in search of right, and bound to do right. Nothing is clearer under the heavens, than that the equities in both cases are *identical* and *equal*. Why then, should the judgments be dissimilar?

But my associates, who cannot deny the facts as I have stated them, nor the natural equity of the *cestui que trusts*, nor the course of courts of equity, in decreeing *primary* payment, say that our statutes make provision only for the liability of the estates of such trustees as *may have been appointed by the laws of Georgia.*

I take this to be a great error. The Legislature having, by the Declaratory Act of 1790, made the estates of deceased executors, administrators and guardians, dying chargeable with trust property, *primarily liable*, subsequently impressed with the necessity of extending similar relief against *all trustees'* estates, as the equities were the same—enacted the paragraphs which have before been mentioned. My associates have, instead of giving effect to an enlarging Act, in its *widest sense*, and in accordance with its language, narrowed or re-

t, so as to confine it to a very limited class, to-wit :
tees as may have been appointed under the laws of

narrow interpretation be correct, upon what grounds
of the *cestui que trusts*, born on our soil, after the
perty was brought into Georgia, by Samuel P. Cor-
e excluded ? *for as to them, the trust arose in Georgia.*
but regret this interpretation as not only unsound,
terly unwarranted by any of the rules employed by
text writers in the ascertainment of legislative will.
oreover, incapable of being supported by even a
reason.

ware of the position occupied by my associates, that
executors, administrators and guardians are not in-
our statutes, for the reason that those appointed
re not recognized as such in our courts ; but as Sam-
orbin's estate is pursued, not for his default and
ness, as either an executor, administrator or guardian
Carolina commission, I deem it unnecessary to dis-
question.

uestion is restricted to the determination of whether
e of a trustee, created by a deed or will, made out
gia, if he, subsequently bringing such property into
and here possessing, controlling and managing it to
of his death, dying chargeable therefor, is not *pri-*
able to the *cestui que trusts*, before his other creditors.
else can they pursue their property, mingled with
e of the trustee, but in the Courts of Georgia ? No
f contract is involved, requiring construction accord-
to lex loci. Upon what principle, then, are the reme-
ded by statutes, and which the forum administers
in suits, come from where they may, denied to them ?
it do to reply that our statutes so direct. I deny
do, and demand the proof by those who assert that
actions the position "that debts due by trustees
appointment, dying chargeable, are to be paid
their character, as bonds, accounts, etc., the

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same as if owing by others, without priority on account of such character."

This decision is not *interpretation*, but *judicial legislation*. It is an alteration of a clear, unambiguous statute, without a tittle of argument or reason to sustain it. Nor does the decision stop at the alteration of the paragraphs 2312 and 2494; but it goes further, and prescribes an order for the payment of the indebtedness of a trustee, appointed out of Georgia, dying here, chargeable to the trust which he possessed, managed and controlled, *which the statute has not*.

By what authority do they assign to debts, due by a trustee of foreign appointment, dying in Georgia, an order of payment, according to the form in which those liabilities are evidenced as bonds, notes, etc.?

By this judicial legislation the result will be, that if the claims of *cestui que trusts* should not be evidenced by some judgment against the dead trustee, some mortgage, or bond or note, they will go to the *foot of the list*, of the order of payment out of the assets prescribed for the direction of executors and administrators, and take their place among the account creditors of the deceased trustee.

Again, it causes a discrimination to be made, as among *cestui que trusts*, and makes it depend upon the form in which the indebtedness of the trustee exists, so that the one who has a judgment, is to be paid before the *cestui que trust*, who holds the bond of the trustee, and he who holds the bond, before the one who holds merely the note.

Now, no such discrimination can be made in cases of trustees appointed in Georgia and dying chargeable for property possessed, controlled and managed by them as trustees; for the law, by a sweeping, comprehensive declaration, enacts that for *all the indebtedness* for trust property, without regard to the form by which it is evidenced, his estate shall be *primarily* liable.

Why, in principle or common sense, should there be a difference between the liability of the estate of a deceased foreign appointed trustee and a domestic appointed one? Our Legislature cannot be charged with either the injustice

the absurdity of such discriminations. The primary liability of estates of dead trustees is founded on the indisputable equity that the *cestui que trust's* property should be separated, withdrawn or accounted for in value, to its extent, before the individual creditors are let in for payment; but the construction here, as to the estates of trustees pointed out of Georgia, dying chargeable with the trust funds in hand of *cestui que trust*, is, that they come in only *ri passu*, and according to the forms in which the indebtedness to them exists, thus sanctioning the payment of the individual creditors, by contract with a trustee, out of the property of *cestui que trusts*, or that into which it was converted by the misconduct or fraud of their trustee.

The obvious intent of our statutes, was to recognize this paramount equity to primary payment, without the slightest regard to the shape or form by which the debt was evidenced. The Legislature looked only to the *important fact* of the trustee dying chargeable with trust funds in hand, and placed, by the words and spirit of their Act, all *cestui que trusts* upon the same *equality*, without reference to any other consideration than that the property of which he, as trustee, died possessed was theirs, or rather that their property should be so separated, first from his property, and when this shall have been done, then that his individual creditors, on his *personal contracts*, should, according to the grade of their claims, be paid out of his property left after the separation from the trust property or funds.

The majority of this Court have associated with deceased executors, administrators and guardians, appointed out of Georgia and dying chargeable with the funds of the estate in their hand, *trustees appointed abroad*, and dying here, chargeable with trust funds.

This has been done, not by the Legislature, but by the Court. The association is a forced one, and as the majority have virtually interpolated the Act of 1799, by restricting the liability prescribed by it to the estates of executors, administrators and guardians as were appointed under the laws of Georgia: so too, with less reason, and of their

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own will, have they likewise virtually interpolated, in paragraph 2312 of the Code, after the words "the estate of trustee," the words "appointed or created in Georgia on and in paragraph 2494, after the words "or any debt due the deceased as trustee," the words "created or appointed in Georgia only."

I do my associates no injustice when I assert that their decision carries on its front the evidence of *unauthorized legislation by them*, and as effectually introduces into those paragraphs, and incorporates their opinions therein as substantially as if it had been by the law itself enacted, the *relations which they have made*.

Nor can my associates derive, in support of their decision, an argument from the maxim *noscitur a sociis*, as the Act refers to executors, administrators and guardians, entirely separate from those touching trustees.

The Act of 1799, providing for the *primary* liability of estates of executors, administrators and guardians, embraced only the specific class comprehending them. The subsequent legislation extended to the *genus* trustees of every other kind the same provision made as to the specific class.

I conclude by saying that to me it is a source of argument, that my associates should have overlooked the plain, palpable and unanswerable reason, which must have influenced the Legislature to declare that "the estate of trustee, dying chargeable with trust funds in hand, shall be appropriated, *first* to the payment of such indebtedness as funeral expenses, in preference to *all other liens or claims whatever*." It felt that it was but "sheer justice," as the estate of the deceased trustee had been increased to the extent of the value of the *cestui que trusts* property used and converted by him as their trustee, that their claims should be paid *first* out of his estate, before any other debt. It felt that to give to all *cestui que trusts* a priority of payment, was but a recognition of "a clear equity."

This must have been the reason which led to this enactment. Could any one be more ample and satisfactory, commending, from its natural justice, itself to the approval

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ry honest heart ? and if it be the true reason, it is, *per se*,
ndemnation of the miserable and odious discrimination
e between trustees of foreign and domestic origin, by the
sial legislation in these cases, and against which I enter
rotest.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT ATLANTA,

DECEMBER TERM, 1868.

Present—JOSEPH E. BROWN, *Chief Justice.*
H. K. McCAY, } *Judges.*
HIRAM WARNER, }

JOHN B. PERRY, plaintiff in error, vs. WM. H. HODNETT,
defendant in error.

(This was held up under military order.)

1. A and B made and delivered to C their joint and several promissory note, due twelve months after date. C afterwards, for a valuable consideration, agreed with A, without the consent of B, to extend the time of payment twelve months longer. C endorsed and delivered the note to D after it was due, with notice of the extension of the time of payment. D, after said time expired, sued A and B, as makers, and C as endorser, and obtained judgment. B, who was then absent in the military service, returned, after the rendition of judgment, and entered an appeal within the time allowed by the Ordinance of the Convention of 1865, and set up the defence that he was only a surety for A, and had no interest in the consideration of the note. A, who had entered no appeal, died before the trial, and was not a party to the "issue on trial:"
that on the trial of the issue between D as plaintiff, and B as

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defendant, B was a competent witness under our Statute, to prove that he was only a surety to the note. In a suit by A's representative, after payment out of A's estate, against B for contribution, A and B, who were parties on the same side of the original contract, would be opposing parties to the issue on trial, and B would be an incompetent witness.

2. The evidence that B was only a surety, and that C knew that A was to pay the debt, was sufficient to sustain the finding of the jury, and the extension of time of payment given by C to A, without the consent of B, the surety, released him.
8. A motion was made, which the Court agreed to consider in connection with the record, to dismiss this case, on the ground that the new Constitution of the State, adopted since the trial in the Court below, denies to the Courts of this State jurisdiction to enforce any contract, the consideration of which was a slave, it appearing from the record that the note in suit was given for slaves:

Held, that the judgment which this Court pronounces upon the points made by the bill of exceptions, renders it unnecessary to decide the question raised by the motion.

Complaint. Novation. Tried by Judge VASON. Calhoun Superior Court. March Term, 1868.

This action was bottomed upon the following promissory note:

\$3,745 00. Twelve months after date we, or either of us, promise to pay James W. Powell, or bearer, the sum of thirty-seven hundred and fifty dollars, for value received, and if not punctually paid, interest from date. Dec'r 2nd, 1859.

ROBERT WHITE,
W. H. HODNETT.

Endorsed "J. W. POWELL."

Plaintiff had judgment against the makers and endorser. Subsequently, Hodnett appeared, and showed that he was absent in the army when said judgment was entered, and had a substantial defence, and by permission of the Court, entered an appeal. Hodnett's defence was, that he was only surety for White, and that Powell had contracted to indulge White on the note, and that plaintiff took it with notice.

At the trial, the plaintiff read in evidence the note, and closed. Defendant read in evidence the interrogatories of said indorser, by which it was shewn that he was the owner of the note, and, in the fall of 1865, he took from said Robert

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White his promissory note for one hundred and twelve dollars, in consideration of giving him a year's indulgence on the note sued on; that when the plaintiff bought the note, he was told of that arrangement, and agreed to carry it out; the note was given for slaves; that he never knew nor had any reason to believe Hodnett was not a co-obligor, equally interested with White in the consideration of the note till Hodnett said so, in the fall of 1865, though he (Powell) was not present when the note was signed, and he had no idea that Hodnett was only a security on the note when said indulgence was granted.

Hodnett then offered to testify in his own behalf. His testimony was objected to, because White was dead, but the Court held that he was competent. He then testified that the note was given for slaves; that he was not interested in the consideration, and was only a security for White, though he was not sure Powell knew that when he took the note.

F. M. Harper testified that Powell gave him said note for suit, and told him to sue it in Stewart county, (where White lived,) saying, White was to pay the note; that afterwards Powell told him of said contract for indulgence, and soon after Powell sold it to Perry, he agreeing to carry out said contract. Harper preferred suing it in Calhoun, where Hodnett resided.

All this evidence, to show that Hodnett was a security on the note, was allowed by the Court, over the objection of the plaintiff's attorneys.

The Court charged the jury that, if Hodnett was but a security on said note, though there was nothing in the note to indicate it, he could show it on this trial as a defence against the plaintiff, etc.

The verdict was for the defendant. Thereupon, the plaintiff moved for a new trial, on the ground that the Court erred in allowing evidence that Hodnett was only a security on said note, in allowing Hodnett to testify in the cause, and that the Court erred in charging as aforesaid, and because the verdict was contrary to the evidence, etc. The Court

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refused a new trial, and error is assigned on each of the grounds.

C. B. WOOTTEN, LYON & DEGRAFFENRIED, for plaintiff in error.

W. A. HAWKINS for defendant in error.

BROWN, C. J.

The main question in this case, is whether Hodnett, defendant, was a competent witness under the Act of 1854 to prove that he was not interested in the original consideration for which the note was given, and was, in fact, on surety.

The statute declares, that no person offered as a witness shall be excluded by reason of incapacity from crime or interest, or from being a party, from giving evidence, etc. Under this general rule, there are certain exceptions, of which the following is the only one that bears upon this case. Its language is :

1. "When one of the original parties to the contract cause of action, in issue, or on trial, is dead, or is shown to the Court to be insane, or when an executor or administrator is a party in any suit, on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor."

We think the proper construction of this clause is, that the parties must have been on different sides of the contract or cause of action, or must be opposing parties, with conflicting interests in the issue on trial, to exclude the survivor as a witness, on the death of one of the parties. In this case White and Hodnett, as makers, were on the same side of the original contract, and in the original suit, were sued together by Perry, and judgment rendered against them, as makers and Powell, as endorser. Neither White nor Powell entered an appeal. At the time of the rendition of this judgment Hodnett was absent in the military service, and after his return home, he alone entered an appeal, within the time

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ified by the Ordinance of the Convention of 1865, and as a defence that he was, in fact, a surety to the note, without interest in the consideration; which fact did not appear upon the face of the note. Perry is mentioned as plaintiff, and Hodnett as defendant, through the entire record, after the appeal, including the bill of exceptions. In the mean time, White, the other maker, died, and his estate was not represented in any of the litigation subsequent to the appeal. The original judgment remained against Perry and Powell, unreversed and unsatisfied. The only question on trial was between Perry and Hodnett, and the judgment to be rendered on the trial of this issue, could in no way affect the interest of White's estate, as he was not a party to the issue on trial; and in case the estate should pay the original judgment, and sue Hodnett for contribution, the judgment could not be evidence in his favor against the estate, which was neither a party to this issue, nor in any way represented on the trial. In case such an action should afterwards be brought by White's representative against Hodnett, their interests would then become antagonistic, and they would be opposing parties to the "issue on trial." In that case, White being dead, Hodnett, the opposing party, could not be a competent witness in his own favor.

But it was insisted, by the plaintiff in error, that Hodnett ought not to be released, admitting all he states in his testimony to be true, as it was not proven that Powell, the maker and holder of the note, knew that Hodnett was a slave when he agreed, for a valuable consideration, to pay the time of payment. We do not think it necessary to enter into a discussion of the question here raised, as we are satisfied upon an inspection of the record, that there was no evidence that White, alone, was to pay the note, to the finding of the jury; and as the presiding Judge sustained the verdict, we will not disturb it on this point.

The record in this case, discloses the fact that the note was given for slaves, and rested upon no other consideration. Since the trial in the Court below the new

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Constitution has been adopted, which contains the following language: "*Provided*, that no court or officer shall have, nor shall the General Assembly give jurisdiction or authority to try or give judgment on, or enforce any debt, the consideration of which was a slave or slaves, or the hire thereof." Counsel, for defendant in error, moved to dismiss this case, on the ground that neither this Court, nor any other court in this State, can entertain jurisdiction of this case, under the above provision of the Constitution. The Court agreed to consider this motion in connection with the record. After a careful consideration of the questions made in the record, we are satisfied that the judgment we pronounce upon them renders it ^{it is} necessary to decide the question raised by the motion to dismiss. We therefore affirm the judgment of the Court below.

WRIGHT BRADY, adm'r, etc., plaintiff in error, *vs.* FURLOW, PRICE & FURLOW, defendants in error.

McCoy, J., having been of Counsel, did not preside in this case. It stood over from June Term, 1868, by reason of the military order.

When an order was made in an equity cause, setting the same down for trial, to ascertain whether the complainant's claim had been finally adjudicated by a former decree of the Court:

Held, that the granting such order, was not such a final disposition of the cause as will entitle the party complaining, to bring up that decision to this Court, upon a bill of exceptions thereto, under the 4191st section of the Code.

Equity. Motion to dismiss Writ of Error. JUDGE VASON. Sumter Superior Court. October Term, 1867.

William Dennard died in 1850 or 1851, testate, leaving his property mainly to his son, Burton T. Dennard, to the exclusion of Julia, daughter of testator and wife of Wm. M. Brady. A *caveat* was filed against said will. That litigation was compromised by Burton T. agreeing to divide the

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property with his sister Julia, upon certain terms. In carrying out this agreement, Burton T. Dennard and Wm. M. Brady farmed together for the year 1853, and thereby produced a confusion of the goods, etc., of said Burton T., and Wm. M., as trustee for his wife.

In December, 1853, Burton T. died intestate. Said Wm. M. became his administrator, giving Wright Brady, as one of the securities on his bond. Burton T., having been largely in debt, many judgments were obtained against said Wm. M., as his administrator, and many debts against him were yet open. Said Wm. M. also owed private debts, and some of them were in judgment. Among these debts not in judgment, was one arising in this way: Said Wm. M. had procured Furlow, Price & Furlow, of Americus, Georgia, commission merchants, to make to him certain advances of cash, upon drafts drawn against said Wm. M.'s cotton-crop. In endeavoring to pay back these advances, Wm. M. had notified Furlow, Price & Furlow that he had forty-one bales of cotton, at a certain place, and directed them to send for it, and sell the same, and with the proceeds discharge said drafts. Accordingly, they sent three wagons, which took twenty-five bales of the same (all they could carry,) to Americus. Meanwhile, and before said twenty-five bales had reached the actual custody of Furlow, Price & Furlow, and before the sixteen bales had been moved from said place, Wm. T. Brady died, and Wright Brady became his temporary administrator. He stopped the delivery of said cotton. Furlow, Price & Furlow claimed that it had been all constructively delivered to them. Wright Brady said no, and the sheriff, in behalf of plaintiffs, in *fi. fas.* against said Wm. M., was about to sell the same. Possessory warrants and a bill of injunction, by Wright Brady, as such administrator, kept the matter hung up till 1st January, 1859, when Furlow, Price & Furlow filed a bill against Wright Brady, as administrator of said Wm. M. *et al.*, by which all the defendants were enjoined from interfering till their rights, in the matter of said cotton, were adjudicated. Wright Brady, besides being the administrator of said Wm. M., was the adminis-

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trator *de bonus non* of said Burton T. Dennard. Furlow Price & Furlow had gotten said twenty-five bales, and sold them. Besides this litigation, Irena, wife of said William Dennard, had filed a bill, seeking to make one Foy, who had a claim against said William, go upon the estate of said Burton T., therefor, etc. Julia Brady, widow, had married Jourdan Wilcher, and they filed a bill, to ascertain and secure the rights of said Julia, in the matter of her trust estate; and other creditors of Wm. M. and of Burton were proceeding, as best they could, to get their respective rights.

Under these circumstances, on the 12th of August, 1856, Wright F. Brady, as administrator of said Wm. M., and administrator *de bonis non* of said Burton T., filed a bill in Equity against all of said claimants, setting up the doubtful condition of said estates, his danger as said security, and from the probability of mistaking his duty, etc., etc., and prayed that said claimants should be enjoined, except so far as it was necessary for them to fix or ascertain their rights, and that all these matters should be disposed of by one decree under this last bill.

At April Term, 1864, the following order was taken:

“ WRIGHT BRADY, adm'r, }
 vs. } *In Equity.*
 FURLOW, PRICE & FURLOW. }

It is hereby consented and agreed that all the cases in which Wright Brady, as administrator of Wm. M. Brady, Furlow, Price & Furlow, Mrs. Wilcher, formerly widow of Wm. M. Brady, Shadwick T. Crawford, and other creditors of Wm. M. Brady, be tried together. It is ordered that said cases be so tried.”

They were so tried. The decree, after providing for the other claims, was as follows: “6th. That Furlow, Price & Furlow have a judgment, of this date, against Wright Brady, for the amount of their claim, the same to be a lien on the cotton from the 1st of December, 1856, though only to be a judgment *quando acciderint*, for any amount it shall

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not receive out of said funds of Wm. M. Brady, and that the creditors of said William M. be paid, according to their priority and dignity, out of any of said fund arising from the undisputed property of said William M., after paying the proper expenses of administration of said estate. 7th. That the Court make such order as may be necessary to execute this decree."

The Court appointed an auditor to adjust the said claims, &c. He reported, as part of the assets of said Brady's state, \$1,165 69, principal, and \$794 00, as interest from the 1st of April, 1857, in the hands of Furlow, Price & Furlow, as proceeds of said twenty-five bales of cotton. He did not say what should become of said proceeds, but did find that Furlow, Price & Furlow pay the costs of their bill. This report being filed, the Court, by order, allowed forty days after the adjournment of the Court for filing exceptions hereto. No exceptions having been filed, at April Term, 1867, the jury found that said report should be confirmed and spread upon the minutes as their verdict. Thereupon a decree was made, in which it was adjudged that Furlow, Price & Furlow bring into Court, within sixty days from its adjournment, said specified proceeds of said twenty-five bales of cotton, principal and interest, to be distributed by the Court, according to said report, and that upon their failure to do, execution issue against them for the same.

They did not pay. *Fi. fa.* was issued, but by stay-laws; &c., they had kept from paying said money until October adjourned term, 1867. At that term a motion was made to amend the decree in the case of Furlow, Price & Furlow, so to make it conform to said verdict of the jury. Wright, administrator, etc., was required to show cause why it should not be done. He showed, for cause, all of said former proceedings, and contended that said case of Furlow, Price & Furlow had been finally tried and properly disposed of. The Judge, "upon inspecting the record in the above case, and not being satisfied that the rights of Furlow, Price & Furlow, as set up in their bill, were settled and adjudicated by the decrees in said case," ordered their bill "set down for

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trial at the next term, with the right of Brady, administrator, to show that said rights of said Furlow, Price & Furlow were settled and adjudicated by said decrees." He further ordered a stay of said proceedings till further order. To that order, setting down said case for trial, etc., said William Brady, administrator, etc., by his counsel, excepted, and assigns the same as error.

When the case was called for trial here, a motion was made to dismiss the same, because said order was interlocutory, therefore, the cause was prematurely brought here.

B. HILL for plaintiff in error.

COBB & JACKSON, S. C. ELAM, for defendant in error.

WARNER, J.

The complainants in the Court below made a motion to have the cause set down for trial, which motion was resisted on the ground that the claims of the complainants in the bill, had been adjudicated by a former decree of the Court in a cause in which the complainants, with others, were parties. The Court, upon the inspection of the record, not being satisfied that the claim of the complainants had been finally adjudicated by that former decree, ordered the cause be set down for a hearing, to *ascertain that fact*, which order of the Court was excepted to, and brought up to this Court for review.

A motion is now made to dismiss the writ of error on the ground that the order of the Court below, which was excepted to, is not such a *final disposition* of the cause as will entitle him to bring up that decision to this Court upon a bill of exceptions thereto, under the 4191st section of the Code. That section of the Code declares that the cause shall be carried to the Supreme Court, upon a bill of exceptions, so long as the same is *pending* in the Court below; unless the decision, or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a *final disposition of the cause*.

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er party may, at any stage of the cause, file his exceptions, the same certified, and entered of record until the final disposition thereof, in the manner as provided by that sec-

The cause is *still pending* in the Court below, according to the express order of the Court, to which, exception taken. The order setting the cause down for trial, was such a *final disposition* of it as is contemplated by the Act, and, in our judgment, was prematurely brought here. Let the writ of error be dismissed.

BYRD & COKER, plaintiffs in error, vs. H. R. JOHNSON & Co. *et al.*, defendants in error.

A contract between a factor or commission merchant and a planter, creating a lien upon the crop of the latter, for provisions furnished to make it, is not required, by the Act of 15th of December, 1866, to be in writing. The lien is a good one, between the parties and their agents and purchasers, with notice, though it be only in parol.

A bill filed by the factor, and sanctioned, granting a *ne exeat* against one charged to have a portion of the crop in possession, as agent of the planter, and requiring him to produce the same, that it may be subjected to the lien, ought not to be discharged on the coming in of the answer, not deriding the plaintiffs' equity, except on information and relief, even though supported by an affidavit, setting up title in the defendant to the crop, especially when the affidavit does not deny notice of the lien.

Decided by JAMES M. CLARK. Chambers. Sumter County. September, 1868.

The case made by the bill is as follows: Berry Byrd & William Coker, partners and commission merchants, in Dawson County, Georgia, under the style of Byrd & Coker, on the 15th April, 1867, entered into a special contract with John C. Stewart, of Stewart county, Georgia, under the Act of the General Assembly of Georgia, approved 15th of December, 1866, which gave to him provisions to enable him to make a crop on Stewart county, in said Stewart county, i. e., they agreed to

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furnish him bacon at thirty cents per pound, and corn at \$2 75 per bushel, and said Byrd agreed to give them therefor a lien, under said Act, upon his crop.

Under this agreement, they furnished him with eighteen hundred and fifty-one pounds of bacon, and one hundred and sixty and two-thirds bushels of corn; furnishing it at different times, during 1867. (Of this bacon, four hundred and twenty-five pounds was delivered to Wesley Byrd, son of said John Byrd, and for it, Wesley paid Byrd & Coker.) John C. Byrd made his crop, which he could not have made without said advances. On the 7th of January, 1868, he carried four bales of cotton, of said crop, to the warehouse of H. R. Johnson & Co., Americus, Georgia, who still had possession and control of the same. Complainants were advised that said John Byrd or H. R. Johnson & Co., sold said cotton to Adolphus S. Kendrick, of said county. H. R. Johnson & Co. refused to point out said cotton, or to allow an examination of their books, so that the sheriff might levy on the same, for complainants. Therefore, complainants feared that said Kendrick would remove said cotton out of this State, and they believed that H. R. Johnson & Co. were about to remove it, and thereby defeat said lien.

They prayed that said Kendrick and the members of the firm of H. R. Johnson & Co., (Henry Johnson and Thos. Harrold,) be arrested and required to give bond and security not to remove the cotton out of this State, or to have the same forthcoming to answer the decree in this case; that *sub-pœna* issue to Kendrick Johnson and Harrold, requiring them to answer whether the cotton is in the warehouse, whether it was sold to Kendrick, and when, and for what, etc., and for general relief.

Judge Vason, then presiding in said county, passed an order requiring bond and security from said defendants, (in the sum of \$1,000,) not to remove the cotton from said warehouse, nor from the jurisdiction of the Court, etc.

Kendrick answered the bill, saying simply, that his purchase was *bona fide*, and that he knew nothing of the claim set up by complainants.

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The other defendants afterwards answered, (demurring therein, because said John C. Byrd was not made a party defendant to said bill.) Henry R. Johnson answered that there was no such firm as H. R. Johnson & Co., nor any firm composed of himself and said Harrold: He denied all knowledge of any such lien as complainants claimed, or of any such advances made by them; said that John Byrd, on the 8th January, 1868, brought to the warehouse of Harrold, Johnson & Co., (composed of said Johnson and Harrold, and B. Harrold,) in Americus, four bales of cotton, representing that they were the property of James W. Harris, of Webster county, Georgia, and requested them to sell the same and pay the proceeds to him, for Harris, as he was acting as agent for Harris; that he, Johnson, being busy, requested N. B. Harrold to sell it: he did sell it, and paid the proceeds to John Byrd, for said Harris; but after this litigation, they paid the money back to Kendrick, and kept the cotton; this they did after they had refused to point out the cotton to the sheriff. He further set up that Coker met John Byrd when he was bringing said cotton to Americus, and gave no notice to those who might purchase, of any lien thereon; that on the 2d of January, 1868, John C. Byrd brought five bales of cotton to said warehouse, which were sold and shipped off on the 6th of January, 1868; that no such lien was recorded in Stewart county, and that he denies that complainants have, or ever had, any such lien, and he and Harris both, affirm that said four bales of cotton belonged to said Harris.

For these reasons, he did not believe there was any such lien, and if there was, it should not affect the defendants.

The separate answer of the Harrolds was substantially the same as that of Johnson.

They obtained from said Harris his affidavit, stating that the cotton was "the individual property of deponent, and not the property of said John C. Byrd, and that said cotton was, and is free from any lien in favor of said Byrd & Coker, or any other party or parties whatsoever, and that the only

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possession or control which said John C. Byrd had of the said cotton, was as the agent of this deponent."

Upon these answers, and this affidavit, Judge Clark, upon motion of defendants, set aside said order, and that is assigned as error.

W. A. HAWKINS for plaintiffs in error.

GOODE AND CARTER for defendants in error.

McCAY, J.

1. The first section of the Act of 15th December, 1866, which enacts that *landlords* may have a lien, etc., does require that it shall be by "special contract in writing." But the second section, which relates to factors and merchants, only says that the lien may be upon such terms as may be agreed upon between the parties. Why this difference should be made, we confess we do not see. Such, however, is clearly the will of the Legislature as deduced from its words.

2. Upon the demurrer, the facts of the bill are admitted, and this bill clearly charges the agreement, the furnishing of the supplies, the making of the cotton, and that four bales of it, or its proceeds, are in the hands of H. R. Johnson & Co., the agents of the planter. If the lien is good at all, it is good against the maker of it, and his agents and purchasers, with notice. The demurrer, then, ought to have been overruled.

Ordinarily this Court will hesitate greatly before it will interfere with an order of a judge dissolving a temporary injunction. In this case, however, the dissolution is in fact a total denial of the complainants' rights. If this writ is discharged, he is, according to his bill, remediless. We do not think, therefore, that, under the answer and affidavit, the writ ought to have been discharged. The affidavit did not pretend that Harris was not fully aware of the complainants' lien, whilst the answer stated nothing material which was responsive to the bill, except upon mere hearsay and belief. We think the case ought to be held for trial, when the par-

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ties can be fully heard, and their rights be determined by a jury.

There may arise, on the trial, a very interesting question under this statute. The statute provides that the liens therein provided for shall be enforced in the same way and manner that liens are now enforced against steamboats in this State. It has been contended that this gives to the factor a preferred lien; that like the lien of steamboat employers, it is of "the highest dignity." We make no decision, at present, upon this point. This case, in its present aspect, does not require it, and the question is one of great importance. When it is properly made, will be time enough to decide it.

Judgment reversed.

ZENA THOMAS, plaintiff in error, vs. THE STATE, defendant in error.

The bill of indictment contained but one count, which was for murder. The jury returned a verdict of guilty of "involuntary manslaughter," which was received by the Court, and the jury discharged. A motion was made in arrest of judgment, on the ground that there are two grades of involuntary manslaughter, one punishable as a felony, the other by less punishment.

Held, that the motion should have been sustained by the Court.

Murder. Motion in arrest of judgment. Decided by JAMES M. CLARK. Sumter Superior Court. September Term, 1868.

Zena Thomas, a negro, was indicted and tried for murder, and the verdict was "we, the jury, find the defendant guilty of involuntary manslaughter."

A motion was made to arrest the judgment "upon the ground that said verdict was not according to law, and not justified by the pleadings in said case," in that it did not define whether the killing "was in the commission of an unlawful or a lawful act."

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The Court refused to arrest the judgment, and this refusal is assigned as error.

M. CALLOWAY, W. A. HAWKINS, for plaintiff in error, cited sections 4262, 3529, 3530 and 3531, of the Code. New Constitution, Art. 1st, Sec. 8. *Davis vs. the State*, 22d Ga. R., 102.

W. B. GRIMES, Sol. Gen., by PARKER, (Sol. Gen. of Pataula Circuit,) for THE STATE, cited *Bulloch vs. The State*, 10th Geo. R., 47; *Hoskins vs. The State*, 11th Geo. R., 92, and *Long vs. The State*, 12th Geo. R., 293.

BROWN, C. J.

Was the Court right in refusing to sustain the motion in arrest of judgment in this case? We think not. Involuntary manslaughter is thus defined in the Revised Code, sections 4261, 4263: "Involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner. *Provided, always*, that when such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offence shall be deemed and adjudged to be murder."

Involuntary manslaughter is in the commission or performance of a lawful act, where there has not been observed necessary discretion and caution.

The first grade is punished as a felony. The second by a less punishment. The verdict had been received by the Court, and the jury discharged from the consideration of the case. Of which of these grades of involuntary manslaughter did the verdict find the defendant guilty? It is impossible to tell. How, then, could a legal judgment be rendered upon

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finding? We think the decision of this Court in the case of *Davis vs. The State*, 22 Ga., 101, lays down the principle which must control this case.

Judgment reversed.

STEPHEN B. KIMBROUGH, plaintiff in error, vs. JOHN R. WORRILL, defendant in error.

Where A bargained to B certain slaves, which at the time were runaway, and B paid to A the price agreed upon, and it was agreed, at the time, between the parties, that if B did not, by a certain fixed time, get possession of the slaves, A should repay the money.

Held: That this was only a conditional sale, and if B failed to get the negroes, there was no sale, and A holds the money for B's use, and B may recover it, and it is not a debt, the consideration of which is a slave or slaves.

Jurisdiction. Motion to dismiss. Decided by JUDGE J. M. CLARK. Sumter Superior Court. October Term, 1868.

Kimbrough brought complaint, in March, 1866, against John R. Worrill, upon the following writing:

"GEORGIA, SUMTER COUNTY,
"MARCH 14th, 1868.

"Rec'd of S. B. Kimbrough eight thousand dollars, in full of the purchase money of two certain negroes, to-wit: Cornelius, a man about twenty-four years of age, black, Adeline, a woman about twenty-nine years of age, dark, copper-color, which said negroes I hereby warrant sound and healthy in mind and body, and slaves for life, said negroes being now runaway. I also warrant their recovery in six months from date; if not recovered within said six months, then, in that case, I am to refund said amount, in the new issue of Confederate notes, to be made on the 1st day of April next, and pay interest thereon till the first day of January next.

JOHN R. WORRILL.

Witness: N. C. ALSTON."

The defendant moved to dismiss said cause upon the ground that this was a suit for a debt the consideration of which was a slave. The Court did dismiss it, and that is assigned

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W. A. HAWKINS, for plaintiff in error, cited the Constitution of 1868.

C. T. GOODE and S. H. HAWKINS, for defendants in error, made no reply.

McCAY, J.

This was not a suit on a contract, the "consideration" of which was a slave or slaves, or the hire thereof.

The "consideration" of the "debt" described in this declaration, is the money paid by Kimbrough to Worrill, and which Worrill was to pay back to Kimbrough, in a contingency which has happened.

The words of the Constitution are: "any debt, the *consideration* of which was a slave or slaves, or the hire thereof."

When the plaintiff failed to get the negroes, by the terms of the contract, the money was to be repaid. What was the consideration of this agreement to repay the money? Certainly not the negroes. The consideration plainly was the *money* which Kimbrough had paid.

This was, in fact, but a conditional sale, and when the condition precedent—the recovery of the negroes—failed to be performed, Worrill owed the money, not in "consideration" of the negroes, but of the money paid, and he held that money for Kimbrough's use. *Masters vs. Marriat*, 3d Leventz.

The contract may be epitomized thus: "In consideration that John R. Worrill has paid me this day ——— dollars, I agree to repay him the same, after six months, if by that time I have not succeeded in recovering certain run-away slaves which he has this day sold to me.

Judgment reversed.

Boone vs. Sirrine.

THOMAS S. BOONE, plaintiff in error, vs. WM. SIRRINE,
adm'r, defendant in error.

Two parties rented a store-house for one year, from 24th November, 1867, the rent to be paid quarterly, and soon after dissolved the partnership, and one of them continued the business on his own account for a time and died. His administrator obtained an order from the Court of Ordinary, authorizing him to continue the business for the balance of the year, for the benefit of the estate. The widow applied for the year's support, allowed by law for herself and children, and the appraisers allowed her \$2,700, which was made the judgment of the Court of Ordinary, and which left the estate insolvent. The other partner was also insolvent. The landlord filed a bill, praying an injunction against the administrator, to restrain him from turning over the estate to the widow, or otherwise disposing of the same till his note was paid.

Held, That the dissolution of the firm did not affect the rights of the landlord, as a tenant can not, under our statute, transfer his lease without the consent of the landlord; and the lease, so far as the landlord's rights were concerned, remained partnership property, and forms no part of the estate of the deceased partner till the rent is paid, and that the landlord is entitled to his rent out of the proceeds of the business done in the house, or the stock in trade, for the time the administrator used the premises, before the estate is turned over to the widow of the deceased.

Equity. Injunction. Widow's year's support. Decided by Judge J. M. CLARK. Sumter Superior Court. September Term, 1868.

Mayo, on the 25th of November, 1867, rented a store-room to Nunn & Baily, for one year, at \$570 00, payable quarterly, and accordingly, took their four rent notes, payable to himself or bearer. They were partners as booksellers, etc. Soon afterwards, Baily retired from the firm, leaving Nunn in possession of the store and stock. Mayo transferred said stock to S. S. Boone, as collateral security for a claim Boone had against him.

Nunn died. Sirrine administered upon his estate, and by authority of the Ordinary, was carrying on said business, and employed a clerk, continued to occupy the store, and sold the stock, etc. Commissioners, appointed by the

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Ordinary, had set apart \$2,700 00, as the proper year's support for Nunn's widow and children, and the Ordinary approved the same. One of these rent notes became due and was presented to Sirrine for payment; he declined paying it, upon the ground that it must be put on the foot of other claims against Nunn & Co. Thereupon, Boone filed his bill in Equity against Sirrine, as such administrator, setting forth the foregoing facts, and that Mayo's solvency was doubtful, that Baily was insolvent, and so was Nunn's estate and thereupon, prayed that Sirrine should be enjoined from paying to the widow anything over \$500 00, and not more than that, out of said stock, until said rent was paid, and that he be enjoined from disposing of said stock to complainant's damage. The claim of Boone, by his bill, is put upon the following grounds, viz: his claim is a partnership debt, and should take priority over the private debts of Nunn, and as Sirrine has used the store to sell the stock, for the benefit of the estate, the rent is, properly, a part of the necessary expenses of the administration, and therefore, has priority; and further that the year's support could not be over \$500 00, the estate being insolvent.

The Court granted a temporary injunction, with an order to show cause why it should not be made perpetual. The answer denied none of the facts stated in the bill. The Chancellor dissolved the injunction, and this is assigned as error.

S. C. ELAM, for plaintiff in error, said this rent was a partnership debt, etc. Secs. 1886-1908, Irwin's Code, 2 *Ga. R.*, 374. It was a part of the expenses of administration. Irwin's Code, secs. 2504, 2506; and that the year's support should be only \$500 00, sec. 2530, Irwin's Code.

W. A. HAWKINS for defendant in error.

BROWN, C. J.

The store-room was rented to Nunn & Baily, as partners, who commenced business in it as booksellers, and soon after dissolved partnership, Nunn remaining in the possession of the room, and conducting the business, and Baily retiring. Did this dissolution of the firm affect the rights of Mayo, or of Boone, his assignee? We think not. Mayo rented to Nunn and Baily, as a firm, and accepted them jointly, as his tenants, and they could not, without his consent, change the relation, by a conveyance, one to the other, so as to compel Mayo to accept either alone as his tenant, or look to one, or to the individual estate of one, for the payment of his debt.

Section 2253 of the Revised Code, declares that the tenant cannot convey his usufruct without the landlord's consent, and that it is not subject to levy and sale. We are quite clear, therefore, that the dissolution of the firm did not affect Boone's right, as assignee of the rent notes, to look to the partner in possession for the payment of the rent out of the stock in trade in the store, or the proceeds of the business.

After Nunn's death, his administrator, with the consent of the Ordinary, continued the business in the store-room, under the rent contract, for the benefit of the estate, and now refuses to pay the rent notes for the time he possessed the room, on the ground that this debt must be put on the footing of other debts against Nunn & Co. We do not think the lease, or the stock in trade, ceased to be partnership property, as against the rent notes, till they are paid. And as they formed no part of Nunn's estate, the widow had no right to take these assets in payment of the very liberal allowance (in view of the condition of the estate,) which had been given her, as year's support, till the administrator had paid the rent due, at the least, for the time he occupied the store under the order of the Court of Ordinary. Our opinion, therefore, is, that the Court erred in dissolving the injunction.

Judgment reversed.

Lazenby vs. Wilson.

P. W. O. LAZENBY, administratrix, plaintiff in error,
JAMES R. WILSON, defendant in error.

In cases which arise under the Scaling Ordinance of 1865, the general of this Court is not to disturb the verdicts of juries, unless the same are contrary to law, or manifestly against the weight of the evidence or contrary to the principles of equity, as regulated by law.

Scaling Ordinance. Motion for new trial. Decided Judge GIBSON. Columbia Superior Court. March Term 1868.

P. W. O. Lazenby, as administratrix of J. B. M. Lazenby, sued Wilson upon two promissory notes, as follows :

“\$786 00.

“Twelve months after date I promise to pay J. B. M. Lazenby bearer, seven hundred and eighty-six dollars, for value received. October 21st, 1862. JAS. R. WILSON.

Endorsed thus :

“Received on the within note the interest up to January 1st, 1865. P. W. O. LAZENBY,” and “Received on the within note one hundred ten dollars, price paid for a mule. February first, eighteen hundred sixty-six.”

“\$170 00.

“Twelve months after date I promise to pay J. B. M. Lazenby bearer, one hundred and seventy dollars, for value received. December 17th, 1862. JAS. R. WILSON.

Endorsed thus :

“Received on the within note the interest for one year, eleven dollars and twenty cents. August 10, 1865.”

The defendant sought to scale the notes. At the trial, the notes being read in evidence, plaintiff closed. The defendant shewed the relative value of gold and Confederate currency during the war, (by introducing the table of Barber & Son's brokers,) and shewed that “no other currency was in use at the time the notes were made, or when it was due, but Confederate currency, and that contracts generally, made at that time, were for Confederate currency, and such was the custom of the country, unless otherwise specifically agreed to the contrary,” and closed.

The Judge read to the jury the Ordinance of 1865,

old them, that if these notes were renewals of old debts, they could not reduce them; that if, from the evidence, they ascertained that it was the intention of the parties that the notes should be paid in Confederate treasury notes, they might find for their value in gold, either at the respective dates of the notes, or when they were due, respectively, or at any time between the dates and maturity of the notes, respectively; that if they should not find, from the evidence, that it was the intention of the parties that said notes were to be paid in Confederate currency, they should find for the full amount of the notes, the presumption being that "dollars" in promissory notes means gold or "legal tender" currency.

The jury found for the plaintiff \$520 13 and costs. The plaintiff moved for a new trial, upon the ground that the verdict was contrary to evidence, the principles of equity, etc., and contrary to the charge of the Court. The new trial was refused, and this is assigned as error.

E. H. POTTLE, (by L. STEPHENS,) for plaintiff in error.

A. R. WRIGHT, (by the Reporter,) for defendant in error.

WARNER, J.

The error assigned to the judgment of the Court below, is the refusal of the Court to grant a new trial. This is a case which comes within the provisions of the Ordinance of 1865. Upon looking into the record, the questions involved in the issue upon trial appear to have been fairly submitted to the jury by the Court, and the Court being satisfied with the verdict rendered in the case, we do not discover anything in the verdict that will authorize this Court to control the discretion of the Court below in refusing to grant a new trial. The general rule of this Court is, not to disturb the verdicts of juries in this class of cases, unless contrary to law, or manifestly against the weight of the evidence, or contrary to the principles of equity as regulated by law.

Let the judgment of the Court below be affirmed.

 Bank of Commerce *vs.* Barrett, Carter & Co.

BANK OF COMMERCE, plaintiff in error, *vs.* BARRETT, CARTER & Co., *et al.*, defendants in error.

The fact that the consideration of a note is set forth on its face, does not carry with it notice of the failure of consideration, if it has failed, to a person taking it *bona fide*, nor is he *ipso facto* put upon inquiry, and bound to inquire whether the consideration has failed.

Assumpsit. Motion for new trial. Decided by Judge Snead. City Court of Augusta. May Term, 1868.

The Bank of Commerce sued Barrett, Carter & Co., makers, and T. G. Barrett, as endorser on a promissory note, in these words :

“\$500.

AUGUSTA, GA. Aug. 5, 1868.

One hundred and twenty days after date, we promise to pay to the order of Thomas G. Barrett, five hundred dollars, in consolidation of National Express and Transportation Company, value received, with interest after thirty days.

BARRETT, CARTER & Co.

(Endorsed) T. G. BARRETT.

J. V. H. ALLEN, Treasurer.”

At the same time, it sued said Barrett, as maker, and said firm as endorser, of another note, in the same words, for \$250, drawn by him on the firm, and endorsed by the firm and said Cashier. By consent, these cases were consolidated and tried together.

The defence was, that the notes were given to the National Express and Transportation Company, in payment of installments on stock of said Company, due from said Barrett, on an agreement to consolidate and reduce said stock, which was never done, and that plaintiff took them with notice of the consideration and its failure.

Plaintiff's attorney read in evidence said notes, and closed. The defendants' attorneys then offered to show by one of said defendants, that the consideration of said notes had failed. The testimony was objected to as immaterial, until the plaintiff was shown not to be a *bona fide* purchaser before due, and without notice, etc.

The Court overruled the objection. By the same witness the offered to show that the failure to consolidate the stock of the

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ional Express and Transportation Company was a fraud on its stockholders. This was objected to for the same reason, and the objection was overruled. The witness then testified that the notes sued on were given in payment of a subscription to the stock of the National Express and Transportation Company, and with the understanding, on the part of the company, to consolidate and reduce the amount of its stock from fifty to twenty shares, and that this understanding, on the part of the company, was never carried out. The evidence being closed, the plaintiff's attorneys requested the Court to charge the jury: 1st. "If the maker of negotiable paper relies on the failure of consideration for which the paper was given, as a defence against a *bona fide* holder before maturity, he must show, not only that the consideration had failed, but that the holder had knowledge of a failure at the time when he received the paper." 2d, that nothing was good as a defence against negotiable paper, in the hands of a *bona fide* purchaser before due, except immoral consideration, gambling, *non est factum*, or fraud in procurement, *which fraud must be practiced by the holder in procuring the note.*" 3d, that "value received" in negotiable paper, imported that value has been received by the makers.

The defendants' attorneys requested him to charge the jury, that the form of the notes sued on was sufficient to put the plaintiff on its guard in taking them, and that he took them at his own risk.

The Judge gave the first request by plaintiff's attorneys, with this addition: "But, in a case like this, when the consideration is set out in the note, it behooves the taker to inquire whether or not the consideration had failed, and if, in fact, the consideration had failed, the defence is good, even though the taker did not know of such failure." He gave the second request, except the words in italics. He gave the third, with this qualification: "Such is the usual effect of the words 'value received,' but in a case of this sort you will give the words the import which you think they ought to have."

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He charged, as requested by defendants' attorneys, further, that if it was proven that the consideration of notes had failed, or that they were procured by fraud, plaintiff could not recover; and further, that it was for the jury to determine "whether the words of the notes were notice to the plaintiff, and if they were, plaintiff could not recover."

After the jury had retired, they returned into Court for further instructions. The Judge then said, "the Court charges you that the words used in expressing the consideration were sufficient to put the holder on inquiry;" and when asked by a jurymen, "Then the jury are to inquire whether the words used were or not sufficient notice?" he answered, "I again charge you that, in my opinion, the words were sufficient notice to put them upon inquiry."

The verdict was for the defendant. A new trial was motioned for by plaintiff, on the ground that the Court erred in overruling the objections to defendants' testimony; in qualifying the first and third requests to charge, as he did; in refusing to give the second request; in charging, as requested by defendants' attorney, and as he did in the balance of the charge; and in his remarks to the jury when they came for further instructions.

This motion was overruled. Error is assigned here upon each of said grounds.

BARNES & CUMMINGS for plaintiff in error.

W. T. GOULD for defendant in error.

McCAY, J.

This was a suit upon a promissory note. The note was expressed upon its face, to be "to pay to the order of Thos. Barrett, five hundred dollars, *in consolidation of National Express and Transportation Company, value received.*" At the trial, the Court charged the jury that the words on the face of the note were notice, to the party buying it, of consideration, and sufficient to put him up on inquiry as to whether or not the consideration had failed.

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The *bona fide* purchaser of a note not due, who has no notice of a failure of consideration, cannot be defeated by such a plea. Notice of the consideration alone, is nothing. Why should that affect him? That the note was given for money, or a horse, or a house, is wholly immaterial. How can the knowledge that a note was given for a horse, be notice that the horse has proven worthless? One can, perhaps, imagine a case in which the mere knowledge of the consideration would involve also the knowledge of its failure—when the failure was matter of universal notoriety, or was caused by the party charged, etc., but so far as appears, this is not such a cause.

Nor is the other point in the charge, that the knowledge of the consideration is sufficient to put the party up on inquiry, good law. Such a rule would largely restrict the negotiability of commercial paper, and has, so far as we know, no authority to support it.

Judgment reversed.

BENJ. F. SIMMS plaintiff in error *vs.* SOUTHERN EXPRESS COMPANY defendant in error.

The public laws of the several States of the United States will be judicially recognized by the Courts of this State, when published by authority of the respective States; or may be proved, as required by law, under the great seal of the respective States.

This Court will not, as a general rule, control the discretion of the Court below, in granting a new trial, unless it is manifest there has been an abuse of that discretion, either in violation of law, or the principles of equity, as regulated by law.

Assumpsit. New trial granted. By Judge Gibson.
Richmond Superior Court. June Term, 1868.

Benj. F. Simms averred that said Company was a corporation, and a common-carrier from New Orleans, Louisiana, to Richmond, Virginia, and, as such, on the 18th of February,

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1862, received from him, at New Orleans, to be delivered to R. H. Hunton, at Richmond, Virginia, ten bales of wool, worth \$10,000, and undertook, and promised to deliver the same to him, but failed to do so, etc.

It was shown by plaintiff that, at said time, he, in person, did deliver said wool, 5,182 pounds, to defendant, as charged, that it was marked to R. H. Hunton, Richmond, Virginia, that the defendant undertook to deliver it to him at Richmond, (that he took a receipt for it but had lost it;) that it was then worth fifty cents per pound, and at the trial, was worth from thirty-seven and a half to forty cents per pound in United States currency. And plaintiff testified that it never reached Richmond. The plaintiff having closed, defendant showed, by interrogatories of Jno. B. Hunton, (the date of which does not appear,) that he is a brother to said consignee, who is blind and helpless, and had not been capable of doing any business, by reason of impaired mind, for twelve months before the answers were taken; that in March 1862, he and this consignee were connected in the manufacture of woolen goods; that he knew of no shipments of wool from plaintiff to said witness' factory, in February or March 1862; that R. H. Hunton sold some wool to Crenshaw & Co., who were manufacturers of woolen goods, how much witness did not know, (nor did he give the date of said sale,) that R. H. Hunton was in New Orleans in 1861 and 1862, and was to buy wool, all he could, for their factory, free of commissions.

A member of the firm of Crenshaw & Co. testified, that sometime after the 1st of March, in 1862, at Richmond, he bought eight bales of wool, (eight, he thought); he did not know who was the consignee, nor who sold it to him, but he knew that it was not an employee or agent of defendant; he bought it from a stranger, either at the Southern Express Company's office or at witness' own office; he saw them at the defendant's office; he thought he never received any wool from said consignee, unless that was from him.

They showed that the books of defendant in Richmond were burnt. An agent of defendant, in the Richmond office

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to 10th April, 1862, testified that the freight-bill, from New Orleans to Richmond, of February —, 1862, bore an entry of ten bales, consigned from New Orleans to R. H. Hunn, Fredericksburg, Virginia; the eight bales which arrived at Richmond, were stored in the storage-room of the company, because they were prevented from going to Fredericksburg, by reason of military movements. Shortly afterwards, they were delivered to Crenshaw & Co., of Richmond, Virginia, upon whose order, or by what authority, he could not say. The rules of the company required him, when goods could not be forwarded, to notify consignor or consignee, and hold them subject to order. Witness' recollection was that, under the custom, these goods were delivered on the order of the consignee, and he was positive that he did not deliver them without proper authority. He recollected this transaction, because it was unusual for such bulky freight to fail to reach destination, and because he required Crenshaw & Co. to pay charges, etc., upon the ten bales, promising to furnish the other two when they arrived, etc. Upon cross-examination, he testified that he quit defendant's employment 10th April, 1862; that he knew nothing of the usual passage of freight through the office; but when any irregularity occurred, it had to be reported to him, and that is why his attention was called to this case.

The defendant further showed that, at the date of said shipment, they used, for freight, but one kind of receipt, in which was the following stipulation:

"It is further agreed, and is a part of the consideration of this contract, that The Southern Express Company is not to be held liable, for the property herein mentioned, for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever, unless specially insured by it, and so specified in this receipt; which insurance shall constitute the limit of the liability of the Southern Express Company, in any event."

And it also contained a clause, declaring that they would not be liable for more than \$50 00, unless the value of the goods was stated in the receipt. These receipts were signed by the company's agent.

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The evidence being closed, the defendant's attorney requested the Court to charge the jury that "the law of place where the contract was made, governs the construction of the receipt in this case, and that the terms of that receipt exempt the defendant from liability for more than \$50 and that plaintiff is bound by that condition." The Court refused so to charge; but charged that, "the defendant, being located in Georgia, the law of Georgia controlled the construction of the contract." The jury found for the plaintiff \$2,591 00, with interest from 21st March, 1866. (The case was brought 20th March, 1866.)

Thereupon, defendant's attorney moved for a new trial upon the grounds that the Court erred in refusing to charge as requested, and in charging as he did, and because, except as to the two missing bales, the verdict was contrary to the evidence, etc. The Judge ordered that there should be a new trial, unless plaintiff's attorneys would write off all the error for the said eight bales.

The plaintiff assigned this order as error, and, in the second bill of exceptions, the defendant assigns as error, the refusal to charge, and the charge as aforesaid.

BARNES & CUMMINGS for plaintiff in error.

W. T. GOULD, for defendant in error, cited Roberts vs. Riley, 15 Lou. An., 103, 23 U. S. Dig., 76.

WARNER, J.

There are two errors assigned in this case to the judgment of the Court below. First, that the Court erred in charging the jury, as requested by defendant's counsel, that the law of the place where the contract was made, controlled the construction of the contract. If the law of the place where the contract was made be different from the law of this State, it is incumbent on the party who asserts it, to shew, by proper evidence, that difference of law is applicable to the contract. This may be shewn by producing the public laws of Louisiana, or any other of the United States, as published by *authority*, or by a duly certified

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of such law, properly authenticated, under the great seal of the respective States. Code, sections 3771, 3772. There was no evidence before the Court which would have authorized the charge, as requested, and the Court did not err in refusing it.

Upon looking into the evidence in this record, we find no error in the Court below in granting a new trial. The jury found a verdict for the value of the *ten* bales of wool, with interest, and we will not control the discretion of the Court in granting a new trial in this case.

Let the judgment of the Court below be affirmed.

JULIUS KAUFMAN, plaintiff in error, *vs.* **MYERS & MARCUS**, defendants in error.

Where a distress-warrant, for rent due by the contract, in American gold coin, was taken out, and an issue was made as to the amount due, under the 4012th section of the Code:

Held, that it was not error for the Court below to charge the jury in accordance with the law as determined by this Court, in *that particular case*.

Distress-warrant. Legal tender notes. Decided by Judge SNEAD. City Court of Augusta. August Term, 1868.

Myers & Marcus sought, by distress-warrant, to collect from Kaufman certain rents, which Kaufman had promised to pay them "in American gold coin" the sum sworn to, being the sum promised "in American gold coin." Kaufman contended that he could discharge his said promise by United States legal tender treasury notes, at their nominal value, though they were at a discount as compared with American gold coin. The Court below held that Kaufman could so discharge his said promise. This Court reversed that judgment, and ordered a new trial. See 37th Geo. R., 601.

When the case went to trial again, the plaintiffs asked for a verdict for the amount of rent admitted to be due, in Amer-

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ican gold coin, *plus* the admitted premium on American coin, in greenbacks. The defendants' attorney objected this, and asked the Court to charge the jury that a distress warrant is an execution, and can only issue for money generally; that though the contract in this case may have been specific, yet, the plaintiffs, having elected a distress warrant as their form of remedy, could not, in that form of proceeding, recover more than the amount expressed therein in legal currency of the country, known as United States tender treasury notes.

The Court refused so to charge, but charged that this having been carried to the Supreme Court, and the decision of the City Court having been reversed, the judgment of the Supreme Court should govern all similar cases, and was a special law of this case, and that they should find in accordance with said Supreme Court decision; that under said decision, plaintiffs could recover, in that form of action, the market value of the sum of money, in American gold, which they claimed to be due. The jury found accordingly. The defendant's attorney assigns as error said charge of the Court.

HOOK & CARR, for plaintiff in error, said: A distress warrant is only a *fi. fa.* Cobb's Dig., 900. Code, section 4. *Smith vs. Green et al.*, 34 Ga. R., 179. *Holland vs. Br* 15 Ga. R., 113. A *fi. fa.* can issue for money only. *Senberger vs. Watts*, Am. L. R. U. S., 1560. It is enforced by sale. Code, sections 3576, 3599. A *fi. fa.* for one to be paid in another, is unknown to the law, and therefore illegal. *LeCaux vs. Eden*, Douglass, 594; *Ashby vs. W et al.*; 2 Ld. Raymond, 944; Lyttleton, section 108; L 229; *Wood vs. Brillens*, 6 Allen, 516. The distress warrant must be for a sum certain. Statute Anne, 8, c. 11, amendatory of 2 W. & M., c. 5; 2 Geo. R., 11, c. 19; 1 R. 315 and 443; *Marshall vs. Giles*, 3 Brev. R., 488; *Phelps U. P.* 1317; *Blackstone's Com.*, 111-6-14. Distress warrant does not lie for specifics. *Clark vs. Froley*, 3 Blford R., 264; *Owens vs. Conner*, 1 Bibb R., 605.

Shaifer & Co., vs. Baker & Caswell.

BARNES & CUMMING, (per L. STEPHENS,) for defendants
in error.

WARNER, J.

This was a proceeding, under the Code of this State, by a distress-warrant, to recover the amount due for rent of certain premises, payable, by the terms of the contract, in American gold coin. This case was before this Court at the last term, when the judgment of the Court below was reversed, and a new trial ordered, upon the ground that the Court erred in holding, that a contract for the payment of a specific sum, in American gold coin, could be discharged by the payment of the same nominal sum, in what is generally known as United States legal tender treasury notes. Upon the new trial, in the Court below, that Court charged the jury in conformity with the law as ruled by this Court in that particular case. There was no error in the charge of the Court below upon that point.

Judgment affirmed.

A. C. SHAIFFER & Co., plaintiffs in error, vs. BAKER & CASWELL, defendants in error.

1. In an affidavit filed to prevent an award from becoming the judgment of the Court, under the Code, it is not sufficient to state, in general terms, that the award is the result of accident, mistake or fraud, or is generally illegal; the affidavit must state such facts of fraud, accident or mistake, or designate such illegality as that the Court may see that a mistake, etc., did, if the statement be true, occur, and that it was material to the issue.
2. When the issue, in an arbitration, was the identity of certain bales of cotton, and two written certificates of the same person, a marker and weigher, were introduced, one describing the cotton as marked "C" and the other "C O" and no explanation is made of the discrepancy, it was not mistake or illegality in the arbitrators to "set aside" or give no weight to the certificate.

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Objections to award. Demurrer. Decided by Judge GIBSON. Richmond Superior Court. July Adjourned Term, 1867.

Baker & Caswell was the name of two firms, for convenience, called here, the old and the new firm. A. C. Schaifer & Co., disagreed with these firms, concerning the sale of, account and reclamations on, thirty-five bales of cotton, shipped to them by the old firm, and concerning a draft drawn by them on the new firm for \$457 91, which the new firm refused to pay, till there was a settlement with the old firm. Therefore, A. C. Schaifer & Co., and the firms submitted to arbitration, under the provisions of our Code, the following questions: 1st. Whether the cotton sold by A. C. Schaifer & Co., was that shipped to them by the old firm: 2d. Whether the old firm owed them for reclamations on said cotton, and if so, how much; and 3d. How much the new firm owed them upon said draft, and agreed that the award should cover the whole matter. What was the evidence before the arbitrators does not appear, except inferentially, by inspection of the reasons given by them for the award. They found that the cotton sold by A. C. Schaifer & Co., as per sales rendered, was not that shipped to them by the old firm, because of the unusual loss of weight, because the original sales, dated 3d March, 1866, and rendered 18th July, 1866, designated the cotton as marked C, as did also, the certificate of Arnold Brothers, weighers, dated 17th July, 1866, and the certificate of P. Corcoran, dated the same day; because A. C. Schaifer & Co., on the 5th of December, 1866, wrote the old firm: "The cotton is marked 'G' and is so plain you can recognize your identical mark on the bales;" whereas, the original bill-of-lading and invoice, sent by the old firm to A. C. Schaifer & Co., showed that the mark was "C O," and on the 14th of March, 1867, M. B. Arnold, weigher, certified that the mark was "C O." They then said because of this conflict they rejected this last named certificate, as also, one by P. Corcoran, mender and picker, dated 13th March, 1867, (what this was does not appear.) They further found that

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A. C. Schaifer & Co., owed the old firm \$609 48, that the new firm owed said draft, which should be counted as a set off, and that A. C. Schaifer & Co. should pay the old firm the difference, in full settlement of the matters in dispute.

When this award was entered upon the minutes of said Court, A. C. Schaifer & Co. objected to its being made the judgment of the Court, upon the following grounds: 1st. Because the arbitrators allowed an apparent conflict in the testimony of some of the witnesses, as to the mark, to make them discard their evidence altogether, and upon this ground principally, made said award, when the evidence, taken as a whole, showed that it was the same cotton: 2d. Because the award was the result of a mistake of the evidence and its legitimate force and bearings: And 3d. Because the award was contrary to the law and evidence.

The attorney for Baker & Caswell demurred to said objections, upon the ground that they were not such as were allowed by the statute. The Court sustained the demurrer, and allowed the award made the judgment of the Court. Of this the attorneys of A. C. Schaifer & Co., are here complaining.

HOOK and CARR, for plaintiffs in error, cited the Code, Secs. 4183-4-5. *King vs. Armstrong*, 25th Ga. R., 264. 29th Ga. R., 495.

F. H. MILLER, W. HOPE HULL, for defendants in error, cited Billings on Awards, s. p. 60, 61, 63.

McCAY, J.

Section 4184 of Irwin's Code, taken in connection with section 4183, provides, that when an award has been made, either of the parties may prevent its becoming the judgment of the Superior Court, by "pleading" under oath, that it is the result of accident, or mistake, or fraud, of some one or all of the arbitrators or parties, or is otherwise illegal. Section 3400 of the Code provides, that all "pleas" shall plainly and distinctly set forth the defence. Section 4185, provid-

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ing for the trial of such issues as this, contemplates that there shall be "specifications" of the accident, fraud, etc. Under these sections, it is plain that it was the intent of the Legislature to provide for some more precise issue than a mere general charge of "fraud, accident, mistake, or illegality."

How can it appear that the award is the *result* of the mistake, unless the facts are set forth? There may have been a mistake which was altogether immaterial, and the same of an accident or a fraud. Nothing is better settled than that Courts will not undertake to investigate mere general statements of this character. There must be a statement of facts, a setting forth of the circumstances, so that the Court can say, that if the facts are true, the mistake did occur, and was material. The affidavit must be such as that, if the other party should not deny it, the Court can intelligently pronounce that the award was the result of the fraud, accident or mistake charged.

Men differ so much about such things that there is hardly a case in which the losing party would not be ready to make such general statements.

An award is the judgment of men chosen by the parties, and their judgment ought not, except for good reasons, to fail to be final. The law favors arbitrations, and to allow the judgment to be arrested, and the matter re-investigated by a jury, on such loose charges, would be to fritter away the arbitration law entirely.

We are inclined to think that a finding strongly and decidedly against the evidence would be "illegal," but the facts must be set forth, so that the Court may see that the charge is true.

2. In this case the substance of the facts stated is simply that, to a certain portion of the evidence the arbitrators did not give as much weight as the losing party thinks they ought to have done. The whole is not set forth, and we are unable to say that the award was the *result* of that.

We think that the statement in the award, that the arbitrators "set aside" certain certificates, does not mean that they ruled them out, but that in consequence of their being

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contradictory to other statements made by the same parties, they gave them little weight, and we agree with them. Yet, if we did not, we do not think that, for that reason, the effect of the award should be held as nothing. It is not a mere difference in the judgment the Court may have upon the facts, that would constitute "mistake or illegality." It must be such an error, in judgment, as to shock one of proper judgment—be strongly and decidedly against the evidence. Judgment affirmed.

IN D. A. MURPHY, plaintiff in error, *vs.* JOSEPH CREW, *et al.*, defendants in error.

The plaintiff and defendants in error had issued attachments against Joseph A. Crew, and each had served J. Sibly & Sons with summons of garnishment. The garnishment in favor of Bruce & Co. was first served. Bruce & Co., after Murphy had obtained judgment on his attachment, dismissed their attachment in vacation. At the next term of the Court, they were permitted, with the consent of the defendant on attachment, to reinstate their case:

And, that they lost their priority over Murphy by dismissing the attachment, and that they could not regain it by reinstating their case.

Attachment. Priority of liens. Decided by Judge GIBBS. Richmond Superior Court. June Term, 1868.

E. M. Bruce & Co. sued out an attachment against Crew, and had garnishment served on Josiah Sibley & Sons. Afterwards, Murphy, also, sued out attachment against Crews, and had garnishment served on said garnishees. Murphy obtained judgment against Crews, in June, 1867, for \$131 88, and costs. The garnishees answered that they owed Crews \$57; stated that E. M. Bruce & Co. had, also, previously served them with garnishment, and prayed the protection of the Court.

On the 5th of June, 1868, the attachment of E. M. Bruce & Co., by their attorney, dismissed, there never having been a return upon it. Afterwards, the attorney of E. M.

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Bruce & Co. moved to reinstate their attachment. Crew's attorney was willing to this, but Murphy's objected, and moved the Court to allow him to enter a judgment against the garnishees for the amount of his judgment.

The Court ordered the attachment of E. M. Bruce & Co. reinstated, and refused to allow Murphy to enter said judgment. Why E. M. Bruce & Co.'s attachment was dismissed, what was the amount claimed therein, and upon what ground it was reinstated, do not appear.

Attorney for Murphy assigns for error the reinstating of said attachment, and the refusal to allow him to enter judgment as prayed for.

H. W. HILLIARD for plaintiff in error.

W. T. GOULD, JOHNSON & MONTGOMERY, for defendants in error.

BROWN, C. J.

The single question presented by this record is, whether E. M. Bruce & Co., who lost the priority which they had obtained over Murphy by the first service of their attachment, by serving Josiah Sibly & Sons with summons of garnishment, regained that priority, by obtaining the consent of the defendant in attachment, and the leave of the Court, to reinstate their case on the docket? We think not.

While we do not question the right of the Court to grant the order to reinstate the case, both plaintiffs and defendants consenting, we hold that this could only be done subject to the rights which third persons had acquired in the meantime. When E. M. Bruce & Co. dismissed their attachment, Murphy's right to priority attached immediately, and that right could not be divested by reinstating their case at the next term of the Court. As to the general doctrine on this subject, see Revised Code, 34-45; 5 *Ga.*, 527; 18 *Ga.*, 287.

Judgment reversed.

Pinney & Johnson, vs. Levy, sheriff.

PINNEY & JOHNSON plaintiffs in error, vs. **ISAAC LEVY**, Sheriff, defendant in error.

While the statute, known as the Stay-law, was considered of force, the plaintiffs in *fi. fa.* notified the sheriff that the judgment was recovered against the defendant as a bailee, which was one of the excepted cases in the statute, to which it did not apply, and directed him to proceed to make the money by levy. He refused to do so, and, in response to a rule, claimed that he was not bound to levy under the notice, because the *fi. fa.* did not show on its face that the case was within the exception. This was not a legal excuse. He should have made the levy under the notice, and left the defendant to his affidavit of illegality, or other proper remedy, if the facts were not as stated in the notice, and having failed to proceed with the *fi. fa.*, he is liable.

Rule against Sheriff. Stay-law decided by Jno. C. Snead. City Court of Augusta. November Term, 1867.

Pinney & Johnson brought "complaint" against R. J. Bowie & Co., on the following open account:

"R. J. BOWIE & Co.

To PINNEY & JOHNSON, 23 Fulton Street, New York.

1861.

May 16th, 12 tierces Butter.....	\$189 25
19th, 50 boxes Cheese.....	87 95
26th, 62 boxes Cheese.....	104 76
Feb'y 8th, 42 boxes Cheese.....	71 88
April 8th, To cash on hand, proceeds of sale of goods con-	
signed to them.....	251 98
	<hr/>
	705 82"

Judgment was confessed for principal and interest from the first of January, 1862, in May, 1867, and *fi. fa.* issued, and was put into the sheriff's hands.

Levy, the sheriff, had not made the money at November Term, 1867, and was ruled by plaintiffs' attorneys. In answer to the rule, he said that said *fi. fa.* showed upon its face that it was issued upon a judgment founded upon a debt or contract made before the 1st of June, 1865, and that therefore he was prevented by the "stay-law" from making the money.

On the trial it was admitted by Levy's attorney that the

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following notice was handed to the sheriff, on the day of its date, by plaintiffs' attorney.

"PINNEY & JOHNSON, } *Fi. fa.* City Court of Augusta. May Term,
 vs. } 1867. Principal \$705 82. Interest from Jan-
 R. J. BOWIE. } uary 1st, 1862.

"To Isaac Levy, Sheriff City Court of Augusta:

"Take notice that at the November Term, 1867, of the City Court of Augusta, the money due on the above stated *fi. fa.* will be required at your hands, as it was left with you about the 20th September, with positive instructions to make the money. Your attention is especially called to the fact that the suit was for the value of the goods consigned to, and sold by, the defendant, and that the second section of the stay-law of December 13th, 1866, excepts persons who hold money as bailees from the benefits thereof. October 30th, 1867.

"FRANK H. MILLER, Plaintiffs' Attorney."

It was also admitted by him that suit had been brought in the statutory form, on an account for the proceeds of goods sold by defendant for plaintiffs. (Whether the original writ was read in evidence, does not appear.)

Plaintiffs' attorney thereupon moved to make said rule absolute, because the "stay-law" was unconstitutional and void, and because even that Act did not cover this case. The Judge said that it was unnecessary to argue the first point, because, it being then pending in the Supreme Court, until that Court passed upon it, he would hold it as a valid law. After argument on the second point, he decided that the sheriff was not bound to enforce process founded on a debt created prior to June, 1865, unless he had proper notice (and that, too, shown by the pleadings in the case) that the case was excepted from the provisions of the "stay-law," and he discharged the rule.

Plaintiffs' attorney then moved to amend the judgment and execution *nunc pro tunc*, so that they would conform to the decision of the Court. The Court refused to allow this done, saying he would have to hear evidence as to that fact, and could not do so under such a motion.

Plaintiffs' attorney then moved to take an order requiring the sheriff to enforce the *fi. fa.*, as one not affected by the "stay-law," but the Court would not pass the order.

And now, plaintiffs' attorney says that the Court erred in holding said act constitutional, in discharging said rule, in refusing said amendment, and in refusing said order.

F. H. MILLER, (by W. HOPE HULL,) for plaintiff in error, cited *Aycock vs. Martin*, 37 Ga., R., 124.

HOOKE & CARR, for defendant in error, cited the "stay-law" Acts of 1866, p. 157, and *Armstrong vs. Jones*, 34 Ga. R., 309.

BROWN, C. J.

It was admitted by the counsel on both sides, on the hearing of this case in the Court below, that the attorney for the plaintiffs in *fi. fa.*, had served a notice on the sheriff, that the money would be required at that term of the Court; and that in said notice, the attention of the sheriff was specially directed to the fact that the suit was for the value of the goods consigned to, and sold by, the defendant, for the plaintiffs, and that the second section of the Act, known as the "stay-law," excepts persons who hold money as bailees from the benefits thereof. And it was also admitted that the "suit had been brought in the statutory form on an account, for the proceeds of goods sold by defendant for plaintiffs."

Upon this statement of facts, the Court below refused to hold the sheriff liable, and discharged the rule. We think this ruling was erroneous. As it was admitted that the suit was brought for the proceeds of goods sold by defendant for plaintiffs, in other words, that the defendant was a bailor, and as the sheriff was specially notified that such was the fact, it is very clear that the defendant was excepted from the benefits of the stay-law. If the sheriff refused, under these circumstances, to make the money by levy and sale, we hold that he cannot protect himself by pleading that the *fi. fa.*, upon its face, did not show that defendant was a bailee. He should have proceeded with the *fi. fa.*, and left the defendant to his affidavit of illegality, or other proper remedy,

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if he wished to contest the fact as to the character in which he was sued. Having failed to discharge this duty, the sheriff is liable.

Judgment reversed.

SAVANNAH & OGEECHEE CANAL COMPANY, plaintiff in error, *vs.* JOHN RYAN & JOHN FEELY, defendants in error.

As a general rule, this Court will not control the discretion of the Court below, in dissolving an injunction, unless there appears to have been an abuse of that discretion, in the violation of the principles of law or equity applicable to the facts in the case.

Motion to dissolve injunction. Decided by Judge FLEMING. Chatham county. Chambers. April, 1868.

The "Savannah and Ogeechee Canal Company," a body corporate by the laws of Georgia, filed its bill for injunction and relief against John Ryan and John Feely, as follows: Said Company was incorporated by an Act of the General Assembly of the State of Georgia, assented to 23d December, 1833, and amended by an Act approved on the 18th day of December, 1847. By said first mentioned Act, said Company, under the name of "The Savannah, Ogeechee, and Altamaha Canal Company," was authorized to own and construct a canal from the Savannah to the Ogeechee river, and from the Ogeechee to the Altamaha river, according to the terms and conditions of said Act. By the tenth section of said Act, said Company was empowered to hold any and all lands and real estate necessary for constructing, maintaining, and repairing said canals and the works connected therewith; by the sixteenth section of said Act, said Company "is obliged to keep said canals and locks in good and sufficient order, condition, and repair, and at all times, free and open, remarkable casualties and accidents excepted"; and by the

seventeenth section, it is enacted that "it shall be unlawful for any person or persons to throw dirt, rubbish, trees, or logs into the said canals, or to injure the locks, basins, feeders, or banks, or any part of the work or works appertaining to said canals, or either of them, or in any manner to hinder or obstruct the navigation of said canals, or either of them; and any person or persons so offending shall be liable to an indictment as for a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, at the discretion of the Judge of the Court before whom is the conviction thereof; and the said offender or offenders shall also forfeit and pay to the said corporation four times the amount of the damages by them sustained, with costs, to be recovered by action of debt before a Justice of the Peace, or any court of competent jurisdiction.

In compliance with the terms of said Acts of Incorporation, the Company is the lawful owner of a canal which connects the Savannah and Ogeechee rivers, and of — feet of the land adjacent to either bank of said canal.

John Ryan and John Feely, and the persons employed by them, have, from time to time, cut and interfered with the banks of said canal in the said county, and the lands immediately adjacent to said canal, whereby dirt and rubbish have been thrown into said canal, and injury done to the locks, basins, feeders, banks, and works appertaining thereto, and the navigation of said canal has been hindered and obstructed; complainant, from time to time, repaired said cuts and damages, and has requested the said John Ryan and the said John Feely, and all other persons to desist from the aforesaid illegal conduct, acts, and doings; but they refused to comply with this reasonable request, and threaten that they will continue to cut the banks of said canal, and otherwise to interfere with said canal, its works, and the lands adjacent thereto, property of complainant. The damages produced by a continued cutting of the banks of said canal, and by otherwise interfering with the works appertaining to it, and the hindering and obstructing the navigation thereof as aforesaid, would be irreparable; a resort to the ordinary course of the common

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law courts would be productive of a circuitry and multiplicity of suits. Wherefore, it is prayed that said John Ryan and John Feely, and all persons acting or claiming under them, or either of them, may full and perfect answers make to the several matters and things aforesaid, and be restrained and perpetually enjoined from the cutting, injuring, or in anywise interfering with said canal, its banks and other works etc.

The injunction was granted.

The defendants answered the bill substantially as follows: The incorporation and the ownership of the canal were admitted, but they said that the Company had no title to the lands joining the canal, but only such right of way to the extent of — feet as is proper and necessary to carry into effect the objects of incorporation, and that the title for all other purposes remained in the person or persons who made such conveyance of the right of way to said company; that these defendants owned lands (and one of them was lessee of the lands) adjoining said canal, the natural drainage of which is through said canal, and must have been along the line of said canal, even if it had not been made; the cultivated parts of these lands have been drained into, and through, said canal, and cannot be successfully drained otherwise; and, at all points where said lands were cultivated, said drains have been actually kept open and used for more than twenty years; they have only exercised their rights as proprietors and lessees in clearing out and keeping open said drains and ditches into said canal. They denied that they had in any other manner cut and interfered with the banks of said canal, or the lands immediately adjacent the property of said canal, or had thrown any dirt or rubbish into the same, whereby any injury has been done to the locks, basins, feeders, banks, and works appertaining to said canal, or had hindered or obstructed the navigation of the same, or had threatened to do or commit any of said acts, as set forth in complainant's bill. They claimed their rights, as proprietors and lessees, to keep open and fit for use, the ditches and drains heretofore leading

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into said canal, and absolutely necessary to make their lands of any value whatever, for agricultural purposes.

Further, they said that since they had been restrained by the injunction from keeping open said drains and ditches into said canal, and the said complainant has been thus permitted absolutely to obstruct and stop the drainage of said lands, the latter had been under water, and these defendants had been entirely prevented from making any preparation for the crop which they intended to cultivate on the same, and they had suffered great loss and damage thereby. And they denied that the injury was irreparable, and could not be redressed by resort to the courts of law, or that such resort would be productive of circuitry and multiplicity of suits. Upon the coming in of this answer, they moved to dissolve the injunction, and on the argument, read in support of their answer, affidavits, the substance of which was as follows :

JAMES S. BRANTLY said, that he had been well acquainted with the condition of the Savannah and Ogeechee canal for more than twenty years past, and had resided nearly the whole of that time close to the banks of said canal, and been accustomed to come down the canal in boats ; had also been familiar for many years past with the tracts of land now owned and cultivated by John Ryan and John Feely, and the tract adjoining the former, now leased by him from Mr. Hodgson ; knew from his own observation and experience that it had been the custom and usage during all this time, for the lands adjacent to the canal to be drained into the same ; and he had seen the ditches leading into the canal for this purpose, at various points, ever since familiarity with the canal commenced, and that he remembered with certainty, that such habit of drainage had prevailed as to the three tracts of land before referred to, at least as far back as the year 1856, and in one of them there was and is a conspicuous deep ditch into the canal, which had been constantly kept open as a drain, and cleared out from time to time for that purpose, and he had never known or heard of any other mode of drainage resorted to for the lands aforesaid.

WILLIAM B. HODGSON said, that he had been acquainted

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with the condition of the Savannah and Ogechee canal twenty-five years, and had been a proprietor of lands on both sides of said canal, and adjacent thereto, during the time, and actually leased a tract of land to the defendant John Ryan, which approached to within a few feet of the canal, and that both he and said John Ryan owned other tracts of land adjoining said tract above named, which lay upon both sides of said canal; that during the whole of the time, as he knew from his own personal observation, the lands, as well as other lands adjacent to said canal, have been drained into said canal; nay, that he had that day examined ditches which had been used for the drainage of other lands further removed from the canal than the tracts already referred to, and which ditches he knew to have been used for drainage during said twenty-five years, and verily believed them to have been opened and used for said purposes during a period of thirty years, and that, through these ditches, said last mentioned lands have been also drained into said canal; further that the natural drainage of all the lands in that vicinity was originally in the general direction of the canal, and that unless said drainage had been through said canal, the construction of said canal would have stopped up and destroyed, or have greatly impaired the means of drainage of all of said lands. He knew that the land now occupied by the defendant, John Ryan, adjacent to said canal, had been under cultivation for twenty years, and longer, and the land occupied by the defendant, John Feely, for several years past, and that it would not be possible to cultivate or to keep in cultivation said lands if said means of drainage into said canal should be denied, and that irreparable damage would thereby be occasioned to their owners.

JOHN HOGG, City Surveyor of Savannah, furnished a sketch of the land, and affirmed, in explanation of it, that the swamp land had a distinct fall from the Louisville road southwardly, across the Savannah and Ogechee Canal, and down to the low lands of the Springfield plantation. That the construction of the canal intercepted the natural flow of water along this swamp, leaving no alternative but to drain

the canal itself. The lands on the south side of the canal, belonging to Mr. Feely, while they showed no well-defined swamp, had an inclination towards the canal. This was shown by the ponding of water along the south bank, and those portions a little removed comparatively dry. By observation, extending over a period of thirteen years, it was seen that the drainage of land along the canal had been by ditches or covered drains leading into it, and he had for many years seen such ditches and drains on portions of the land described.

The said complainant read affidavits of the following tenor:

N SCUDDER and EPHRAIM SCUDDER deposed that they own the Savannah and Ogeechee Canal, as now located between the rivers Savannah and Ogeechee, for over thirty years; that they were, from 1847 to 1858, owners and managers of said canal; that said canal had always flowed through the same lands through which it now flows for over thirty years, and rights of ownership over the lands — feet on each side of it, and over the banks of the canal had been exercised by the parties owning said canal for thirty years; that, in all the time during which they owned said canal, no proprietor of adjoining lands had claimed or maintained any right to drain his lands by ditch, or otherwise, into said canal.

HOGG deposed, that at the request of F. Blair, President of the Savannah and Ogeechee Canal Company, he had made a survey of the lands of John Ryan, on Louisville road, in order to determine if there is any possibility of draining said lands other than into the Savannah and Ogeechee Canal, and found it practicable to ditch northwardly across the Louisville road, and into that portion of the Georgia Railroad right-of-way lying on the south side of the road, excavated for the purpose of forming road-bed, along said right-of-way, eastwardly, to the point where the Louisville and Louisville roads meet, thence in a south-westerly direction, crossing the Louisville road into Lot No. 7, of the plantation, owned by A. Holliday, Esq., into

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a branch of the Springfield swamp. There is another ~~and~~ more direct route across Lots Nos. 1, 2, 3 and 4, into ~~at~~ through a brick culvert running eastwardly into the ~~to~~ lands of Springfield plantation. The lands of Mr. John Feely may be drained eastwardly, across the lots owned ~~by~~ Mr. Miller, (being a part of the Springfield plantation,) ~~in~~ a branch of the Springfield swamp. Mr. Miller's lands ~~are~~ already ditched. It would be necessary to deepen the ~~ditches~~ ditches, in order to obtain the necessary fall. This drainage may be effected without crossing the canal.

FRANCIS BLAIR, President and Treasurer of the Savannah and Ogeechee Canal Company, WILLIAM REMSHART and EDWARD LOVELL deposed that since the year 1858, no proprietor or lessee of lands adjoining the said canal had ever asserted or maintained any right to drain his lands, by ditches ~~or~~ otherwise, into said canal; that in one instance, permission had been given temporarily, in which case the party availing himself of the permission always acknowledged the right ~~of~~ the company to stop him; that one of the ditches opened by John Ryan, which appears to be an old ditch, was originally opened by Daniel H. Stewart, who was a stockholder in ~~said~~ company, and applied to said company for permission to open said ditch, and acknowledged their right to close it whenever they pleased; that the said ditch was closed by the company after said Stewart had used it about a year, and had ever since been closed; that the lands through which the ditches opened by said Ryan and Feely are cut, are lands originally conveyed to the said Savannah and Ogeechee Canal Company by Alexander Telfair, Ebenezer Jencks, and Joseph Stiles, and that said Company holds them in fee simple, and had so held them for over thirty years consecutively, and adversely to any one else, as will appear by the titles to said lands attached; said titles were bonds agreeing to make title in fee simple, when called for. They were dated in June, 1826.

In addition to the above, E. Lovell swore that Daniel H. Stewart paid to the Savannah and Ogeechee Company one dollar a year for the privilege of keeping open the ditch

above referred to, deponent being at the time President of the company.

Besides this, they read from their charter, as follows:

SEC. 16. And be it further enacted, That the said corporation shall be obliged to keep the said canals and locks in good and sufficient order, condition and repair, and at all times free and open, remarkable casualties and accidents excepted, to the navigation of boats, rafts, and other water crafts, and for the transportation of goods, merchandise and produce. Provided, the boats, rafts, and other water crafts, are not so constructed as to injure said canals, or to obstruct the free navigation thereof.

SEC. 17. And be it further enacted, That it shall be unlawful for any person or persons to throw dirt, rubbish, trees or logs into the said canals, or to injure the locks, basins, feeders or banks, or any part of the work or works appertaining to the said canals, or either of them, or in any manner to hinder or obstruct the navigation of the said canals, or either of them; and any person or persons so offending shall be liable to an indictment as for a misdemeanor, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the Judge of the Court before whom the conviction thereof is had; and the said offender or offenders shall forfeit and pay to the said corporation four times the amount of the damages by them sustained, together with costs, to be recovered by action of debt, before a Justice of the Peace or any Court of competent jurisdiction.

After hearing argument, the Judge ordered the injunction to be dissolved, and this is assigned as error.

HARTRIDGE & CHISHOLM, for plaintiff in error, said, injunction will be continued until the hearing, when the facts are doubtful. 6 Florida, 368, 533; 27 Ga., 216.

The granting or dissolving of an injunction is a matter in the discretion of the Chancellor; but that discretion must be a sound one. 6 Fla. R., 236, 142, Roberts vs. Anderson; Erwin's Code, sec. 3153, 2 John's C. R.

The public, represented by plaintiff, and having an interest in

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the corporate property, may be injured through the stoppage or incumbrance of trade and commerce passing through the canal; and, in such a case, this Court should allow the temporary injunction to continue for a hearing.

JACKSON, LAWTON & BASINGER, for defendants in reply: This Court will rarely ever interfere with the discretion so exercised, and never, except where it has been abused. *Johnson vs. Allen*, 35 Ga., 253; *Edwards vs. Smith*, 35 Ga., 214, 217; *Swift vs. Swift*, 13 Ga., 145; *Annand vs. Ford*, 29 Ga., 490; *Somerville vs. Reid*, 35 G

His discretion should not be interfered with, if exercised in deciding as to the comparative credibility of witnesses and the weight of evidence, where the subject matter and the witnesses are *local*, and therefore better known to the trial Judge than to a reviewing court.

It was not competent for the Legislature to grant a charter, if it had authorized complainants so to divert the natural flow of water as to damage owners of adjacent lands without making adequate compensation therefor. Code 4890-1, sec. 4906. "Any interruption to the common or necessary use of land is equivalent to the taking thereof." Angell on Water-courses, sec. 465; 14 Connecticut, 14; they are permitted to divert the water at all, they must provide such other outlets as will fully compensate and prevent damage. 21 Pickering, 348, 349. The lapse of time should not prevent injunction. *Wells vs. Sweaton*, 1 Cox's Chan. 101-2-3, *Dent vs. Summerlin*, 12 Ga., 8, not applicable to the facts of this case. They must resort to those remedies pointed out in their charter. See Charter, sec. 17.

WARNER, J.

The error assigned to the judgment of the Court below in this case, is in dissolving the injunction on the coming in of the answer of defendants, and the accompanying affidavits filed therewith. The bill was filed to restrain the defendants from obstructing the complainant's canal by cutting and interfering with the banks thereof, whereby dirt and ru

thrown into the same, to the injury of the works appertaining to said canal, and the navigation thereof. The defendants deny, by their answer, that they have in any other way cut or interfered with the banks of said canal, except by keeping open certain ditches and drains running into said canal; that they have only exercised their rights as proprietors and lessees of the adjoining lands in clearing and keeping open said ditches and drains, and claim that said ditches and drains running into said canal, have been kept open and used for more than twenty years. The injury complained of in the complainant's bill is, *in keeping open these drains and ditches*, which run through defendant's land into the canal. Upon a careful examination of the allegations in the complainant's bill, the defendant's answer thereto, as well as the respective affidavits filed by the parties which appear in the record, we are of the opinion that there was no error in the Court below in dissolving the injunction. As a general rule, this Court will not control the discretion of the Court below in dissolving an injunction, and here appears to have been an abuse of that discretion. No violation of the principles of law or equity applicable to the facts in the case, which the record, now before us, does exhibit. Let the judgment of the Court below be affirmed.

Dunn et al., vs. Bryan,

ALEXANDER DUNN *et al.*, plaintiffs in error, *vs.* HARRIE BRYAN, defendant in error.

John Waters died testate, leaving three daughters. By the *eleventh* item of his will he directed that the residue of his estate, after the payment of debts, and for certain improvements, be invested in bank stock, and that his executors hold it in trust for the equal use and benefit of his daughters aforesaid, during their respective lives, and after their death then in trust for the use of the children of his said daughters, and if either of his said daughters died without issue, her share to go to her sisters, and if either died leaving issue, her share to go to her issue. One of the daughters died without issue. Another died leaving one child, the wife of plaintiff in error; the third is still in life.

Held: that the three daughters were tenants-in-common under this item of the will, and that the two survivors took the share of the sister who died without issue, equally, in fee simple, and upon the death of the second sister, her daughter took her share in like manner, and became a tenant-in-common with the surviving daughter of the testator.

Equity. Tenants-in-common. Decided by Judge FLEMING. Chatham county. Chambers. March, 1868.

This case is as follows:

Harriet Bryan averred that in 1835, John Waters, her father, departed this life, leaving a will, with a codicil attached, and that George W. Anderson, William W. Gordon and William H. Cuyler were appointed therein as his executors. By the fourth item of said will, the said testator devised the two (2) lots of land, numbers five and six, Eyles Tything, Heathcote Ward, and also lot number ten, First Tything, Reynolds' Ward, all in the city of Savannah, said county of Chatham, and all improvements on said lots, in trust, for the use of his daughter, Eliza Waters, during her life, and after her death, to and for the use of her children, if any she should have, and in default of children of the said Eliza, living at her death, then in trust to and for the use of his daughters Jane A. Bruen and complainant, for their respective lives, and after their death, then in trust to and for the use of the children of the said Jane A. Bruen and of complainant, share and share alike, forever.

By the fifth item of said will, testator devised as follows

It is my will that my executors have and hold my lot number ten, (10) Eyles Tything, Heathcote Ward, forever, in trust and for the use of my daughters Jane A. Bruen and Harriet Bryan, for and during their lives, and after their respective deaths, then in trust to and for the use of the child or children of my said daughters, Jane A. Bruen and Harriet Bryan, their heirs and assigns, forever, share and share alike."

The tenth item of said will is as follows: "It is my will that my executors hold and have my railroad stock in trust, and for the use of my daughter Eliza Waters, for and during her life, and after her death, then in trust to and for the use of her children, if any she have, and if none, then in trust to and for the use of my daughters, Jane A. Bruen and Harriet Bryan, for and during their lives, and after their deaths, then in trust to and for the use of their issue, share and share alike."

The eleventh item of said will is as follows: "It is my will that my executors invest all the rest and residue of the proceeds of my estate, and all moneys of my estate, which all remain after the payment of my debts and the costs and charges of the improvements before directed to be made on my lots numbers six and ten, Eyles Tything, Heathcote Ward, in bank stock, and that they have and hold the said stock in trust, for the equal use and benefit of my daughters foresaid, during their respective lives, and after their death, then in trust for the use of the children of my said daughters, and if either of my daughters die without issue, her share to go to her sisters, and if either die leaving issue, her share to go to her issue."

Soon after the death of said testator, to-wit: on the fourth day of January, in the year eighteen hundred and thirty —, said Cuyler and Anderson were duly qualified as executors of said will, the said Gordon declining to accept the said trust, but the whole and sole execution of said will has been conducted and performed by the said Anderson, from said date of qualification and receiving letters testamentary, to the present time. Anderson, as such executor, very soon after his qualification, had erected on said lot number ten, Eyles

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Tything, Heathcote Ward, a two story brick building, in accordance with the directions of testator, contained in the fifth item of his said will, and also a three story brick building on lot number seven, Eyles Tything, Heathcote Ward (which said lot number seven is the lot which, by mistake said testator designated, in the fourth item of said will, as lot number five,) in accordance with the directions of said testator, as given in the fourth item of said will.

Testator, at the time of his death, owned a large number of shares of the capital stock of the Central Railroad and Banking Company of Georgia, the number being unknown to complainant, and in pursuance of the instructions given by said testator, in the ninth and eleventh items of said will, the said executor, Anderson, disposed of the property in said last mentioned items named, and invested a portion of the proceeds of such sale in bank or railroad stocks, for and upon the uses named in the said eleventh item of said will, but in what stocks and in what amounts such investment was made, she is not informed.

Said Eliza Waters, one of the legatees under said will, never married, and died in the month of ——— in the year eighteen hundred and sixty-five, without ever having borne a child, and the said Jane A. Bruen, another legatee under said will, died in the month of July, in the year eighteen hundred and sixty-seven, leaving but one child surviving her, and that said child is a daughter, and is now, and was at the death of the said Jane A. Bruen, (who, after the death of said testator, and before her death for many years, had married one ——— Brown,) the wife of Alexander Dunn, who is now a citizen of the State of New Jersey, and resident of the city of Trenton, so that there remains living only complainant, of the three said legatees, who take an estate-for-life under and by virtue of said will, in all the estate devised and bequeathed by said testator, in the said fourth, fifth, ninth, tenth and eleventh items of said will.

Since the death of the said Jane A. Brown, complainant considering and believing herself to be the only legatee under said will, who is, and since the death of the said Jane A.

been, entitled to receive and enjoy the rents, issues, dividends and incomes from the real estate, and stocks, or other personal property named in the fourth, fifth, ninth, tenth, eleventh items of said will, or which has or have been purchased by said executor with funds arising from the sale of any of the property named in the said ninth and eleventh items of said will, has called on the said executor, George Anderson, and requested him to pay over to her any and all monies which he had in possession, arising from the rents, profits, and income from said real and personal estate, and the said executor, would continue for the future, and during the remainder of her natural life, in compliance with the understanding of the true intent and meaning of the said testator's said will, to pay over said rents, dividends and profits to her, as belonging to her in her own right. But said executor, combining and confederating with the said Alexander Dunn, absolutely refuses to comply with said reasonable request, the said executor pretending, and the said Alexander Dunn claiming, that the said Dunn, by virtue of his marital rights, acquired by his said marriage with the said only surviving daughter of the said Jane A. Brown, deceased, is now, and ever since the death of the said Jane A. has been justly entitled to take, receive, and enjoy, in his said Alexander's own right, all the one-half portion of said rents and income which the said Jane A., as a co-tenant with complainant, was entitled to, and would have received, in her own right, were she, the said Jane A., now living; and the said executor pretends that complainant is entitled to no more of said rents, income and profits, than she would be entitled to receive were she, the said Jane A., still in life; whereas, she charges the contrary thereof to be true, and that she is justly entitled to receive from said executor the whole amount of said rents and income, for and during the remainder of her natural life.

To this a copy of the will was attached as an exhibit. The contents of it not already shewn are as follows :

In the name of God, amen. I John Waters, of the city of Savannah, being of sound and disposing mind and memory,

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but weak in body, do make this my last will and testament. *First.* I wish that all my just debts and funeral expenses be paid. *Second.* I give and bequeath my negroes, Maria, Sandy, William, Adam and Nelly to the Female Orphan Asylum of the city of Savannah, on condition that said corporation exact no service from them, and only the sum of five dollars from each per annum. *Third.* All the rest and residue of my property, real and personal, in possession or in action, and all monies, stocks and debts, I give, devise and bequeath to my executors, hereinafter named; forever in trust to and for the uses hereinafter appointed. *Sixth.* It is my will that my executors have and hold my lot on Broughton street, number four, (No. 4,) Liberty Ward, and the improvements thereon, in trust to and for the use of my daughter, Harriet Bryan, for and during her life, and after her death, then in trust for her children, their heirs and assigns, share and share alike. *Seventh.* It is my will that my executors have and hold my lot number nine, (No. 9,) Second Tything, Anson Ward, adjoining Dr. Reid's, in trust to and for the use of my daughter, Jane A. Bruen, for and during her life, and after her death, then in trust for the issue, if any she have, at her death; and if none, then, after her death, in trust to and for the use of the children of my other two daughters, their heirs and assigns forever, share and share alike. *Eighth.* I give and bequeath to each of my said daughters, two negroes, to be selected by them from my gang, to be held by my executors in trust for them, respectively, during their lives, and after their respective deaths, to their respective children, if any they have, and if none, then to my grand-children, share and share alike. *Ninth.* It is my will that my executors sell and dispose of, at public or private sale, my lot number nineteen, (No. 19,) Columbia Ward, also my plantations and all other of my real estate, not before disposed of by this will, and all the remainder of my slaves, and that unless the negroes be sold with the plantation, that they be sold in families—all this I leave to the discretion of my executors. *Twelfth.* I nominate, constitute and appoint my friends, William H. Cuyler, Geo. W. Anderson, William W. Gordon, or

each of them as shall qualify on this, my will, the executors of my last will and testament. *Thirteenth.* It is my will that the instalments on my railroad stock, which shall hereafter be called in, be paid by my executors out of the residue of my estate. *Fourteenth.* It is my will that my lots in town, given above to my daughters, be never sold by any order of Court, consent of parties, or in any other manner, but always be held for the trusts before named, and in the event of death or disability of all my executors, without representation, the Superior Court of Chatham county appoint a trustee to carry into effect this will.

JOHN WATERS. [L. s.]

It was attested properly. The codicil, made the day after the will, (15th September, 1835,) only corrected a mistake or two in the description of the lots.

Anderson, by his answer, admitted all of said alleged facts, and discovered as to the stocks, that testator, at his death, had seventy shares of stock in the Central Railroad and Banking Company, upon which, two stock dividends had been declared, to-wit: On the 15th of January, 1855, seven shares, and on the 1st of March, 1860, nine shares, making the aggregate eighty-six shares; that, according to the eleventh item of the will, he had purchased one hundred and twelve shares Planters Bank stock, thirty-two shares State Bank stock, twenty-five shares Marine Bank stock, and one hundred and fifty shares Central Railroad and Banking Company stock, which had been increased by a stock dividend of eighteen shares of said stock, making an aggregate of one hundred and sixty-eight shares.

He admitted his refusal to pay as charged, but, denying all combination, etc., said that Dunn and his wife claimed the other half of said rents, etc., and he would not pay out the same without direction from the Court.

Dunn also answered the bill, not denying the statement of facts, but contending that the claim set up by him and his wife was right under the law.

Upon these pleadings, (there being no fact in dispute,)

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the parties consented to try the same before the Judge Chambers.

After argument had, he decided that complainant took life-estate in the entire property, mentioned in said 4th, 10th and 11th items of said will. And this is assigned error.

HARTRIDGE AND CHISOLM, T. E. LOYD, for plaintiff in error, contended that the 11th item made a tenancy-in-common and not of survivorship, between the sisters, citing *Cas.*, ab. 292. *Precedents in Chan.*, 491. *1st P. Williams*, 96. *Cro. Eliz.*, 698. *2d Vern.*, 430. *2d Cowp.*, 657, *2d Ves. Sr.*, 256.

T. M. NORWOOD, for defendant in error, contended the children took *per capita* under the 4th item, citing *Jarman on W.*, 81, sec. 5. *Randolph vs. Bond*, *12th Ga.*, 367. *Lincoln vs. Pelham*, *10th Ves.*, 166; that the wife's life estate is not terminated till complainant's death, citing *Jarman*, 57. *Walker vs. Shore*, *15th Ves.*, 121. *Bald vs. Carver*, *1st Cow.*, 309. *Shannon vs. Jackson*, *30th R.*, 228. *Cumberbeck vs. Perryne*, *3d Vern.*, 484. In further support of complainant's claim, he cited *Riordon Holliday*, *8th Ga. R.*, 79. And *Pearce vs. Edmead Younge and Call*, 246. *Jarman*, 120.

BROWN, C. J.

Upon the argument of this case, counsel for plaintiff in error, as we understood them, abandoned the assignment of error, except as to the *eleventh* item of the will of John Waters. And, indeed, we think the case of *Riordon, guardian, vs. Holliday and wife*, *8 Ga.*, 79, controls the case; except as to said *eleventh* item of the will. We cannot, however, agree with the learned and able Judge, who decided this case in the Court below, that the case just cited, is an authority in point, when we come to construe said *eleventh* item of the will. In that case, the will gave only a life-estate to three sisters, and in no event could either of them take more

than a life-estate in any portion of the property. The language of this will is very different. It is, and that "they (my executors,) have and hold the said stock, in trust, for the *equal* use and benefit of my daughters aforesaid, during their *respective* lives; and after their death, then in trust for the use of the children of my said daughters, and if *either* of my daughters die without issue, *her share* to go to her sisters, and if either die leaving issue, *her share* to go to her issue." Now, we are satisfied that the words "for the *equal* use and benefit of my said daughters," taken in connection with the subsequent words, "if either die without issue, *her share* to go to her sisters," made the estate a tenancy-in-common, and upon the death of Eliza Waters, without issue, that *her share* went to her two surviving sisters, as tenants-in-common in fee simple; and that upon the death of Mrs. Brown, leaving her daughter, who is the wife of the plaintiff in error, her only surviving issue, *her share*, which was then one-half of the estate, went to her said daughter, who became a tenant-in-common with her aunt, Mrs. Bryan; whose share, at her death, goes to her issue.

We think this view of the case is sustained by authority. In the case of Warner vs. Hone, Pr. in Chan., 491, Thomas Gladwin being possessed of several lease-hold houses, for several terms for years, made his will, and devised his property to his wife for life, and after her death, he gave and devised the same to Alice Bunion and her three sons, *equally* amongst them. And it was decreed that they took, as tenants-in-common, though there was no mention of any division to be made, or *equally* to be divided between them.' And accordingly, the plaintiff, who was administrator of Alice Bunion, and had brought this bill for an account of the profits, had an account of the profits, for the time past, and that he should be let into a fourth part of the rents and profits for the time to come.

In Lewen vs. Cox, Cro. Eliz., 695, it is held that a devise to his "two sons *equally*, and their heirs," creates a tenancy-in-common. Popham, C. J., says, "If one devise his goods *equally* to two, there is not any joint-tenancy: for *equally*,

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shows his intention to give to either of them an equal proportion; so of a devise of a term to two equally, they are tenants-in-common." Again, he says of land: "But if a devise were to two and their heirs *equally*, or part and part alike, there is a tenancy-in-common; for every one of their heirs shall have it." And this opinion was afterwards affirmed on a writ of error in the exchequer.

Deme vs. Gaskin, 2 Cowp., 657, was decided by Lord Mansfield. In that case, testator devised his property to M. R., G. R., and T. R., *equally*, and it was held the devisees were tenants-in-common. His Lordship says: "As to the next question, whether this is a tenancy-in-common or a joint-tenancy, there is no room for argument. Equally, as well as equally to be divided, implies a *division*; whereas, if they were to take as joint-tenants, there would be no division."

In Fisher vs. Wigg, 1 P. Wm's., 16, Mr. Justice Gould says: "The words equally divided, or, equally to be divided, make a tenancy-in-common in a will, beyond all dispute."

In the case of Lord Bindon vs. the Earl of Suffolk, 1 P. Wm's., 96, this question was as to the proper construction of the will of the late Earl, who gave £20,000 (due him from the crown,) to his five grand-children, share and share alike, equally to be divided between them, and if any of them died, then his share to go to the survivors, or survivor of them. The question was, whether the grand-children took as tenants-in-common or as joint-tenants, and the Lord Chancellor held that they took as tenants-in-common, and that, by the subsequent words, if any of them died, his share shall go to the survivors, it must be intended, if any should die during the lifetime of the testator. This case, which was decided in 1707, was reversed on an appeal to the Lords; but in the subsequent case of Stringer vs. Phillips, decided in 1730, the opinion of Lord Cowper was adhered to. That case is thus reported in Equity Cases, Abr., 292. "One devised £100 to five, *equally* to be divided between them, and the survivors and survivor of them, and if A, (one of the five,) died before marriage, her share to go over to another person; and it was decreed, that they took this £100 as tenants-in-common;

and that the words '*and that the survivors and survivor of them*' to make them joint-tenants, would be a contradiction, to the first words, whereby they were made tenants-in-common; and that they should be construed to extend only to such, who were the survivors at the death of the testator; and therefore inserted, to prevent a lapse, and this is the stronger by the *limitation of A's share upon a contingency*, by which it is plain the testator did not intend her to be a joint-tenant with the rest; and as the devise was to all five, they must all take alike, and not A, to be tenant-in-common, and the other five joint-tenants."

It was adjudged, in 3 Lev., 379, that if a man devises lands to his two sons, and their heirs forever, and the longer liver of them, to be *equally* divided between them, after his wife's death, this shall be a tenancy-in-common in the sons. See 1 Vernon, 65. 2 Vernon, 430. 2 Ves., 255. Co. Lit., 1906. 2 Rol. Abr., 39. 3 Atk., 524.

But it is insisted that there cannot be a tenancy-in-common under this item of the will, as the three daughters of the testator had a life-estate in the property, and it could not be divided till the *death of the survivor*; and it is questioned by the learned Judge in the Court below, whether any effect whatever should be given to the latter part of this item of the will, which says, "if either of my daughters die without issue, her share to go to her sisters, and if either die leaving issue, her share to go to her issue." Were it necessary to reject any part of the language of the will, we think the words of *survivorship* should be rejected rather than the words which create the tenancy-in-common; as joint-tenancies are not favored by law; and are abolished by our statute. Words even of *survivorship in a will* shall not defeat the effect of words importing a tenancy-in-common; but shall be referred to some time as the death of the tenant for life, or even the death of the testator; although this would be a construction not to be adopted, if there could be any other. See note on page 251, Ves. Sr. Ch. Reps., 1 Am. ed. Russel vs. Long, 4 Ves., 551. Perry vs. Wood, 3 Ves., 204.

We are of opinion, however, that effect may be given to

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every part of this item. Let it be borne in mind that the language of the testator is, "in trust for the *equal* use and benefit of my daughters aforesaid, during their *respective* lives, and after their death, then in trust for the use of the children of my said daughters, and if either of my said daughters die without issue, *her share* to go to her sisters, and if either die leaving issue, her share to go to her issue." Now, what is the plain intent of the testator? That his three daughters shall take this property as tenants-in-common, for their *respective lives*—that is, each to hold her share of the property for her life, and at her death, her share to go to her issue; and if either die without issue, her share to go to the two survivors, who take it in fee simple, as tenants-in-common; and as each dies who has issue, her share goes to her issue. If it had been intended that the three daughters take as joint tenants-for-life, and that the survivor take the whole during her life, why dispose of the share of one dying without issue? Under that construction, the moment she died without issue, her share was at an end, and that part of the will which gives her share to her surviving sisters, after her death, is without meaning. But give the clause the other construction, and every word has its proper place, and its proper signification.

We are satisfied, for another reason, that we do no violence to the intention of this testator by this construction. Upon an examination of the will, we find that the language of the *eleventh* item, which disposes of the *residuum* of the estate, differs from the language of the other items in question. Doubtless the testator had an object in changing the phraseology, when he came to dispose of the *residuum* of the estate, and in using language, different from that used in previous items, by which he gave specific legacies, which were to go to the issue of his three daughters, "share and share alike," "after their deaths."

Judgment reversed.

Houston vs. The State.

MUEL HOUSTON, plaintiff in error, vs. THE STATE, defendant in error.

On the trial of a defendant who was indicted for burglary under the indictment, for breaking and entering a store-house, alleged to be the property of certain parties therein named.

It was held that *parol* evidence of the fact that the parties named in the indictment were in the possession of the store-house under a written contract of lease at the time of the alleged burglary, was sufficient to sustain the allegation of ownership of the premises, in the indictment, without the production of the *written contract of lease*.

Burglary. Motion for new trial. Decided by Judge FLEMING. Chatham Superior Court. June, 1868.

Houston, and other negroes, were charged with burglary in lay time. The house charged to have been broken and entered, was described in the indictment as "the store-house owned by Uriel B. Wilkinson, and of one Benjamin J. Wilson, said store-house being the property of the said Uriel B. Wilkinson and Benjamin J. Wilson."

Houston was tried. During the trial, BENJAMIN J. WILSON swore for the State, that said store-house was rented by Wilkinson & Wilson, (being the parties named in the indictment,) by a written deed of lease, and that witness was in possession of it at the date of the burglary. Thereupon, defendant's attorney objected to any *parol* testimony in reference to the fact of renting, or the terms, or time, or nature of the lease, in as much as there was a written lease. The Court held, that while the witness could not testify as to the terms, or the nature of the lease, he could prove the fact of renting, and that he was in possession at the time of the burglary, and that such evidence was sufficient proof of ownership of the premises.

Houston was found guilty. A motion for new trial was granted upon the grounds that the Court erred in allowing said *parol* testimony of Wilson, and in holding that such *parol* testimony was sufficient proof of ownership of the premises, that it was not necessary to produce said lease to prove said ownership, and because the verdict was contrary to the evidence, etc.

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The Judge refused a new trial, and error is assigned on said several grounds. In this Court, it was conceded, that if the Court was right as to the admissibility of Wilson's testimony and its sufficiency to show ownership of the premises, then the verdict was sufficiently supported by the evidence.

HARTRIDGE, JONES and RICHARDS, for plaintiff in error.

JACKSON, LAWTON and BASSENGER, for the Solicitor General for the State.

WARNER, J.

The only question made in this record is, whether the evidence of the possession of the store-house, alleged to have been broken and entered, was sufficient at the trial, without the production of the *written lease*. The store-house was charged, in the indictment, to be the property of Uriel B. Wilkinson and Benjamin J. Wilson. The evidence was, that they were in possession of the store-house at the time of the burglary, under a written deed of lease. It was objected that the witness could not prove *that fact* by parol, but that the written deed of lease must be produced. The Court overruled the objections, which is now assigned for error here. Burglary is defined by the Code to be "the breaking and entering into the dwelling, mansion or *store-house*, or other place of business of another, where valuable goods, wares, produce, or any other article of value are contained or stored, with intent to commit a felony or larceny." To sustain the allegation in the indictment, all that was necessary to prove at the trial, as to ownership of the store-house, was, that Wilkinson & Wilson occupied and had control of the premises at the time of the alleged burglary; that they were in the *lawful occupancy* of the same as tenants, or otherwise. Roscoe's Crim. Evidence, 275. Their *lawful occupancy* of the store-house at the time alleged in the indictment, was *the fact* to be established at the trial. In our judgment, that distinct *fact* was sufficiently proved without the production of the *written lease*. The question was, not whether the tenants were

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in the *lawful* possession of the store-house as against the landlord, or other persons claiming *title* thereto, but the question was, whether the tenants were in the *lawful* possession and occupancy of the store-house as against *burglars*, who, in violation of law, broke and entered the same, with intent to commit a felony or larceny; whether the tenants had the *lawful* possession of the store-house at the time of the burglary, under a parol or written lease, was not material, the fact that they had such possession at the time of the alleged burglary by the defendant was sufficient, without the production of their *written evidence* of title, to sustain the allegation in the indictment.

Let the judgment of the Court below be affirmed.

MILES G. DOBBINS *et al.*, plaintiffs in error, vs. A. PORTER and WALLACE CUMMING, assignees, defendants in error.

When a bank made an assignment of its assets for the benefit of its creditors, and a large portion of the assets was in money, and securities convertible into money, at a market value, and a creditor, nearly twelve months after the assignment, filed a creditor's bill, charging that, six months after the assignment, and again, shortly before the filing of the bill, he had demanded his share of the cash assets from the assignees, and they had refused to pay him, unless he would release the bank from the whole of his claim, and the bill prayed an account:

Held, that the bill was not demurrable. If there was complication or cause for further delay, it ought to be set up by way of defence; it cannot be assumed.

Judgment reversed, on the ground that the Court erred in sustaining the demurrer to the bill, it being the opinion of this Court that, under the circumstances stated, the bill was properly filed.

Equity. Demurrer. Decided by Judge SCHLEY. Chambers. Chatham county, November, 1868.

The Bank of the State of Georgia, a corporation of said county, had suspended. Public notice of their intention having been given, a meeting of the stockholders was held

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on the 3d of May, 1866. A majority of the stock being there represented, it was resolved that the board of directors should make a deed of assignment, conveying to said Porter and said Cumming all of the assets of the bank, for equal distribution among the creditors and bill-holders, according to law. Accordingly, on the 25th of May, 1866, such deed was made, conveying all the property, real, personal and mixed, to said assignees, in special trust, to "forthwith take control and possession of the estate, property and funds assigned and conveyed, and, within a convenient time, convert the same into money, either at public or private sale, as may seem best, and collect all the debts due to said bank," etc. After the conversion of the said property into cash, and after the collection of the debts due to the bank, and after the payment of expenses, commissions, attorney's fees, etc., they were to pay out and distribute the proceeds of such sales and collections, and all other funds in their hands, among the creditors of the bank, in the order and according to the priority prescribed by law. Or they might make a partial distribution of the assets, or part payment to the creditors, before the whole of the property was converted into money, if the assignees, or the survivors of them, thought this advisable.

The assignees accepted the trust and took possession of said property. Part of this property was (as shown by the schedule attached to the deed) \$7,071 23 in United States currency, \$210,041 34 in gold coin, \$17,135 31 in silver coin, \$100 00 in copper coin, in sterling exchange about \$8,000 00, in bonds and promissory notes, payable in coin, \$14,150 00, and the following stocks and bonds: eighty-five shares of the Augusta and Savannah Railroad Company, \$8,500 00; twenty-one bonds of Pensacola and Georgia Railroad Company, \$21,000 00; seventeen shares of Muscogee Railroad Company, \$8,500 00; two shares of the Alabama and Florida Railroad Company, \$2,000 00.

On the 10th of April, 1867, Miles G. Dobbins and Wm. and R. J. Lowry filed their bill against said assignees, as such, in behalf of themselves and such other creditors as would join in the litigation and pay their part of the ex-

of the same. They averred that they held \$5,000 00 bills of said bank, (which were described,) that the bank was insolvent and made the assignment aforesaid; that assignees took possession of all its assets and property under said assignment, and had sold part of said property, and made no distribution of the same, or of any part thereof.

When these complainants were informed of said assignment, their attorney called at the bank, to-wit: in November, 1866, and asked of Cummings, what the assignees were or would do for the bill-holders of said bank, to which Cummings replied, that they were not paying them anything, as they had advertised, for six months, for all bill-holders to present bills, and as these complainants had not presented bills within that time, they had lost their preference over other creditors. The counsel, without agreeing that that was so, and insisting that it was not, asked him to pay to complainants their *pro rata* share of the money in the hands of the assignees, counting all claims against the bank, and giving complainants no preference or priority. Cummings refused to do this, unless the attorney would release the bank from any other payment, except such as might be realized from the assets in the hands of the assignees. This the attorney refused to do.

Then, on the 10th of April, 1867, the attorney made a demand upon said Porter, (who was absent when the demand was made,) offered to give him an exact description of the list of the bills held by complainants, or to receipt for a bill for the amount paid on it, or give any other thing which the assignee might wish for what he got, and Porter refused to pay anything, unless such release was given. In consequence of all this, they prayed that said assignees should discover what they had done with said property and show how much was due to bill-holders, how much to all creditors, etc., etc., and should account and settle with complainants, and that, if the Chancellor thought best, a receiver should be appointed to take charge of the same, etc., and in this bill, a general demurrer was filed. After argu-

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ment had, the Chancellor sustained the demurrer, and this assigned as error.

WM. DOUGHERTY for plaintiffs in error.

JACKSON, LAWTON & BASSINGER, for defendants in error.

McCAY, J.

This bill charges that in May, 1866, the Bank of the State of Georgia made an assignment of its assets, for the benefit of its creditors, to the defendants; that they accepted the same; that among the assets was \$210,000 in gold coin, \$17,135 in silver, \$800 in sterling exchange, and \$100 in copper coin, a considerable amount of stocks and bonds, with a market value. The complainant is a bill-holder for \$5,000. In November, 1866, complainant called at the bank, saw one of the assignees, and asked for payment. It was refused. He then asked for his *pro rata* share of the cash assets, and was refused, unless he would release the bank from any other payment. He called again in August, 1867, and got the same answer, whereupon he filed his bill in his own behalf, and in behalf of the other creditors. This bill was demurred to, and the demurrer was sustained.

This demurrer was sustained, as it appears, solely on the ground that the facts, as stated, did not show any right in the plaintiff to call the defendants to account, that they did not appear to be in *laches*. Why could they not have paid out the coin *pro rata* immediately? Why not sell the bonds and stock and exchange and banking house, and realize and pay the proceeds of that out? They have had nearly a year. If there were any complications or disputes, as to preferences, it does not appear. It was very easy for them to know the liabilities of the bank and the character of the claims. Why keep this large amount of cash assets idle? If there are any reasons, why so reasonable and business-like a proceeding as an immediate application of these cash assets to the debts should not take place, it ought to appear by answer.

Besides, we are not sure that the demand made by the

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assignee of a release from this creditor, or a proffer to pay *pro rata* if he did release, was not itself a breach of the trust. It was not one of the terms of the assignment. These assignees are emphatically the trustees of the creditors, and they have no right to use the assets, to secure a favor to the assignor.

At any rate, the bill was not demurrable. The discretion given by the deed to the assignees, to make a *pro rata* distribution at their option, is not an arbitrary discretion. It is their duty to exercise it, if it be proper to be done. So far as appears by the bill, it was eminently proper; if there exist good reason against it, that is matter of defence, and ought affirmatively to appear.

THE STATE, plaintiff in error, vs. JOHN DICKSON, defendant in error.

The Western and Atlantic Railroad is the property of the State, and its incomes are part of the revenue of the State. A debt due the road is a debt due the public, and is to be paid before "any other debt, lien or claim whatsoever," except funeral expences, etc., as specified by the Code.

Priority of lien. Decided by Judge MILNER. Whitfield Superior Court. October Term, 1867.

On the 22d of July, 1866, Robert H. Caldwell owed said Dickson \$747 46, and gave him a mortgage on four slaves to secure it. On the 4th of June, 1857, Caldwell owed Dickson other debts, amounting to \$450, and to secure them, gave him another mortgage on said slaves. These mortgages were duly recorded. Judgments of foreclosure was had on said mortgages on the 20th of October, 1859, and on the 5th of November, 1859, respectively. In 1859, (at what date does not appear,) said Caldwell became the agent of the Western and Atlantic Railroad, and so continued during 1860. In that year, he gave bond and security for his good conduct as

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such agent, and for 1860, said Dickson was one of his securities.

Caldwell, as such agent, was a defaulter, and the Comptroller General issued two *fi. fas.* against Caldwell and his securities on said bonds for said years for \$1,346 07, and for \$173 71, with interest, costs, etc., respectively. In January, 1861, these four *fi. fas.* were levied on said slaves, the slaves were sold under them, and brought \$1,805 00. The fund being in the sheriff's hands, a motion was made to require him to pay the Dickson *fi. fa.* therewith. The Comptroller General resisted the motion upon a claim of priority of lien.

The Judge held that Dickson should be paid in preference to the State, but that, in as much as he was one of the securities against whom the State's small *fi. fa.* had been issued, its amount should be paid to the State out of said fund, and it should be given to Dickson, that he might control it against Caldwell, and that any surplus, after paying Dickson, should be paid to the State.

The Comptroller General assigns for error the decision that Dickson's *fi. fa.* had priority of lien before said State *fi. fa.*

SPRAYBERRY, J. A. W. JOHNSON, (by the Reporter,) for the State, said debts due to the public are entitled to priority, citing *New Code of Ga.*, secs. 832-36. *Irwin's Code*, sec. 2494. *8th Ga. R.*, 479, 481-2. *C. R. R. Bk. of Ga.*, *vs. Little, et al.*, *11th Ga. R.*, 346. *Robenson vs. Bk. of Darien*, *18th Ga. R.*, 96 and 97; and this claim is a debt due to the public, citing *Irwin's Code*, sec. 967. *Acts of 1858*, p. 62, secs. 1, 6, 7, 8. *Shields vs. Yonge*, *Sup. W. & A. R. R.*, *15th Ga. R.*, 357, and *Dobbins vs. O. & A. R. R. Co., et. al.*, *37th Ga. R.*, 240.

C. D. McCUTCHEX, (by A. B. Culberson,) for Dickson, replied that the Act of 1858 was not retroactive, that there is a distinction between the lien of taxes and other public debts, that the priority of the State rests upon statutes; 33 Henry 8th chap., 9th, is not in Schley's Digest of Statutes of force in

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Georgia; State *vs.* Harrison, 2d Bailey, S. C. R., 598; Keckley & Keckley, 2 Hill S. C. Chan. R., 256; *Doane vs. Chittenden & Co.*, 25th Ga. R., 108; as to third persons, the Act of 1858 must be construed against the State, *Mayor, etc. vs. Wadbridge*, 8th Ga. R., 30.

BROWN, C. J.

The State, in the collection of her revenues, is not subject to judicial interference, and takes precedence over the claims of individuals.

Taxes, which are part of the revenue of the State, are to be paid before any other "debt, lien, or claim, whatsoever." Revised Code., sec. 809.

The Western & Atlantic Railroad is the property of the State, exclusively. Revised Code, sec. 967.

All debtors to the road are debtors to the State or public, and where any question arises warranting it, the right or obligations of both parties are to be determined upon by the laws governing such relation. Revised Code, sec. 981. Acts of 1858, p. 62, secs. 1-6-7-8.

As the road is the property of the State, and its income is much part of her revenue as the taxes collected by her, it seems that these Acts are simply declaratory of what the law was prior to their passage.

The property of Caldwell was sold, in this case, under a mortgage *fi. fa.*, in favor of Dickson, and under two *fi. fas.*, in favor of the State, issued by the Comptroller General against Caldwell, as a defaulting agent of the road. The *fi. fa.* in favor of Dickson, was an older lien than the *fi. fas.* in favor of the State; and would have been entitled to the money, if this had been a contest between two individuals. But in a contest between the State and an individual, we hold that she takes precedence, without regard to the date of the lien. 8 Ga. R., 479; 11 Ga., 364; 37 Ga., 240; Revised Code, 2494, and Statutes above quoted.

It is insisted by the counsel for Dickson, that his lien had attached before the passage of the Act of 1858, and that the

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Act is unconstitutional as against him, because it impair obligation of the contract between Caldwell and Dickson. We cannot yield our assent to this doctrine. As already stated, we think this statute only declaratory of what law was at the time of its passage. But if it were otherwise we do not see how the *obligation* of the contract between Caldwell and Dickson, can be impaired by the assertion of the State of the priority, in the distribution of this fund which she claims and exercises in all cases, in the collection of her revenues.

Judgment reversed.

ROBUCK & ORR *et al.*, plaintiffs in error, vs. JOHN HARKINS *et al.*, defendants in error.

Bills for a new trial and to restrain a judgment at law, are not favored by Courts of Equity. In order to obtain the assistance of the Court in such cases, the complainant must shew *full diligence*, unimpaired by negligence, on his part.

Bill for new trial. Demurrer. Decided by Judge POTT. Gordon Superior Court. October Term, 1868.

Robuck & Orr had seventeen Justice's Court *fi. fas.* against Thomas Harkins and James Harkins, each for \$30 00, besides interest and costs, founded on judgments, dated the 1st of April, 1856. They had them levied on lot No. 190 in said county, on the 26th of October, 1857, as the property of Thomas Harkins. John Harkins filed a claim to the land, and employed Dawson A. Walker and M. Francis as his attorneys. Walker went upon the bench, and Francis died. Warren Akin was then employed. The case was continued from time to time during the war, and did not come to trial till April, 1867. On the trial, the levying officer testified that Thomas Harkins was in possession of the land when the levy was made; one of the witnesses to the deed

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ed, that at the time of the delivery of the deed from as Harkins to John Harkins, no money was paid; and Millholland, (who was a partner with Thomas Harkins, firm of Millholland, Harkins & Co.,) testified that as said that the witness and the other partner had wasted n assets; that he, Thomas Harkins, had paid his part debts, and intended to transfer his land to John Har- to prevent the firm creditors from recovering any thing im. Here the plaintiff in *fi. fa.* closed.

claimant read in evidence his said deed; showed by nes, that claimant paid to him, for the use of Thomas is, \$300, upon a note originally for about \$700, made n Harkins, payable to Thomas Harkins, and the \$300 dited thereon, and Thomas Harkins said to Jones that e was given for said land.

O'Callaghan testified that he rented the premises, in from John Harkins, and paid rent to him as his land-

mant, in his own behalf, testified, that when he bought id, he gave his note as a temporary settlement only, reed with Thomas Harkins that he, John, would go to Georgia, and pay off said Thomas Harkins's debts, and then take a credit for some \$700, money loaned by o Thomas; that he did so, and when he returned to un, made a final settlement, by which he was in Thomas ns's debt some \$700, for which he gave his note at e months, which he fully paid off; that the sale was ade to delay creditors, but because Thomas Harkins, on of Thomas Harkins, Sr., had returned to North na, and he wished to realize on said land; that because his as about to move, he did not wish to hold said land ; that at the date of his purchase from Thomas Har- Jr., (23d of August, 1855,) Thomas Harkins, Sr. was volved in debt, and there was no reasonable prospect of lure; he did fail about six months after the purchase, e of the burning of a college of which he was the r; and that at the date of the purchase, he, claimant, orth \$10,000, and amply able to pay for said land.

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Claimant also showed by other witnesses, that he had paid the debts of Thomas Harkins, Sr., as stated.

The jury found the premises subject to said judgments.

This trial was during the first week of the Court, which continued for two weeks. The claimant intended moving for a new trial during the next week. He went to Rome, Georgia, on business, and was taken sick, so that he could not return to Court; he sent certificates of his physicians as to his illness to Akin, at Court, but Akin's wife was taken sick and he went home. Before he left, however, he made out a motion for new trial, and left it with James Harkins, and left a note for Col. Mitchel, an attorney of the Court, stating that it had been agreed that this motion should be heard at Whitfield Court, and asked him to take an order that the case should be heard there, and to go there with all the papers in the case.

The grounds in the motion made out by Akin were substantially these: 1st. Because the Court overruled the objection of claimant to the said testimony of Millholland. 2d. Because he had admitted in evidence notices dated ——— day of December, 1856, and signed "Thomas Harkins," notifying his creditors of his intention to take the benefit of the Honest Debtor's Act. It was not shown that Thomas Harkins signed the notices, but his attorney had said notices served. 3d. Because the Court refused to charge, that if John Harkins rented the land, a short time after he bought it, to O'Callaghan, and he took control of it, the fact that Thomas Harkins's wife and children remained on the place with O'Callaghan, is not a badge of fraud. 4th. Because the Court refused to charge, that if O'Callaghan rented the land from John Harkins, he had the right to put whom he pleased in possession, and even had he allowed Thomas Harkins to remain there the whole year, this fact would not be a badge of fraud as to John Harkins. 5th. Because the Court refused to charge that if a deed is made and witnessed as the law directs, and immediately handed to the Clerk to record, and it is recorded a short time thereafter, this does not make it fraudulent, on the ground *that it is secret*. 6th. Because the Court refused to charge, that the fact that Thomas Harkins

ned on the land from the 23d of August, 1855, till the 1st of November, 1855, when the lease commenced, is no evidence of fraud, unless his remaining in possession misled Robuck & Orr, and they credited Thomas Harkins between the 23d of August, 1855, and 7th. Because the verdict is contrary to the evidence, etc.

But for some reason (not disclosed) no such order was made, and this motion was never filed nor presented to the court. In October, 1867, one hundred and thirty acres of land was sold at sheriff's sale under said *fi. fas.*, and bid by Robert M. Young, for \$1,197 50. In January, 1868, the sheriff went to put Young in possession, but by his saying he would enjoin him, etc., he was prevented from doing so. Afterwards, in his absence, the sheriff put Young in, and he put his tenant in possession. Meanwhile, to-wit: on

May, 1861, John Harkins conveyed said land to Win-Scott, and on the 17th December, 1861, Scott conveyed to Wesley M. Neal. Now, said Neal filed his bill averring the foregoing facts, and that John Harkins paid Thomas Harkins, Sr., his father, \$1,700 00 in cash for said land; that Thomas Harkins, at the date of said sale, did not owe Robuck & Orr anything; that Thomas Harkins went out into possession of the premises in October, 1855; that John Harkins immediately went into possession, by his tenant, Callaghan, and by himself took possession in January, 1857, built a house on the adjoining lot, worked this one, and remained there till his home was burned up in 1861; that he remained in possession till he sold to Scott; that Thomas Harkins, Sr. was not in possession when the said levy was made, but that, at that time, John Harkins was building said house, and his tenants, Richard Cain and Stephen Cain, lived on said lands; that if any such remark was made, as that made to by Millholland, it cannot, in law, affect Neal; that said testimony was illegal, because Thomas Harkins, Sr. died, and because Millholland, as partner, was interested in selling the property; that Mitchell was not employed as an agent; that John Harkins and Scott, both being interested, he cannot recover what he paid for said land, and

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that Young has as yet paid nothing on his said bid. He not aver he had paid anything, but his copy deed stated he had paid \$3,750 00.

Upon these facts, joining John Harkins as a complainant he prayed that Robuck & Orr be enjoined from further proceedings with their *fi. fas.*, and Young from paying anything on his bid, and that there should be a new trial in said case, and that Young be made to restore him possession of the premises.

Judge Milner granted an order requiring the defendant to show cause why said prayer should not be granted. The defendant demurred to the bill upon the ground that there was no equity in the same. Judge Parrott overruled the demurrer and this is assigned as error.

W. H. DABNEY for plaintiff in error.

SMITH & BRANHAM, J. W. UNDERWOOD, for defendant in error.

WARNER, J.

This was a bill filed for a new trial, and to restrain, injunction, the judgment of a court of law upon the several grounds set forth in the record. Bills of this description are not, as a general rule, much favored in a court of equity. 2d Story's Equity, 174, sec. 888. In *Stroup vs. Sullivan Black*, 2 Kelly's R., 275, this Court stated the rule to be that a court of equity will not grant relief against a judgment at law, on the ground of its being unconscientious "unless the defendant in the judgment was entirely ignorant of his defence pending the suit, or unless, without default or neglect on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defence, or by some unavoidable necessity." The defendant, in the Court below, demurred to the bill, and the demurrer was overruled, and that is the assignment of error here. In our judgment, the complainants' bill does not make such a case as entitles them to the relief which it

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There is no reason given why the complainants did not except to the rulings of the Court on the trial of the case, within thirty days after the adjournment of the court so as to have had the errors complained of, corrected by the Court, or why they remained *inactive* until after the property was sold by the sheriff, before filing this bill for a new trial. Besides, if the claimant had exercised proper *diligence* before the trial of the claim case, he could have obtained all the relief in the common law court which he now seeks here, under the provisions of the 3668th and 3670th sections of the Revised Code. Let the judgment of the Court below be affirmed.

DUNN, plaintiff in error, vs. MCNAUGHT, ORMOND & Co., defendants in error.

In the case the owners of a farm placed a farmer upon it, under contract, to give him the use of the farm against his skill and labor for five years, and the owners and tenant were to stock it on joint account, and divide the profits once a year, the owners to have the right to terminate the partnership on six months notice, if the farm failed to pay ten per cent profit on the capital invested:

That the bill and answers show that the farm has not paid ten per cent. on the capital advanced by them, and that the owners have a right, under the contract, to terminate the partnership by giving six months notice, and that the Court did not err in granting an injunction, and appointing a Receiver to wind up the affairs of the partnership.

Verdict. Appointment of Receiver. Decided by Judge J. R. Chambers. Bartow County. October, 1868.

For the facts in this case, see the opinion.

W. A. WOFFORD for plaintiff in error.

J. W. WOFFORD for defendant in error

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BROWN, C. J.

McNaught and others were the owners of a farm. Dunn was regarded a skillful farmer. It was agreed that he was to reside upon the farm, and that his skill and labor be set-off against the use of the farm for five years, unless the term be shortened as thereafter provided. He and the owners were to furnish and stock the farm at joint expense, and divide the profits equally, once a year. But if the investment should not prove profitable, the owners of the farm might terminate the partnership by giving Dunn six months notice. If, however, the profits were ten *per cent.*, or over, on the capital invested, it was to be regarded as profitable; and the owners were to have no right to terminate the partnership. And, as Dunn could not furnish his half of the capital to equip and stock the farm, the owners agreed to advance \$2,000 00, and such other sum, if any, as might be convenient for them voluntarily to advance, and Dunn was to allow them one *per cent.* a month on all such advances, as increase, till he might make an equivalent advance of stock or working capital. They were to allow Dunn the cost of removing himself, wife and four children from Canada West to Bartow county; and he was to have the use of the dwelling house, and all farm out-houses, firewood, orchard, garden, poultry, milk, butter and root crops, as much as was necessary for the use of his family, free of charge.

He was so to manage the land, both as to crops and culture, as to improve it, and the owners were to allow nothing for permanent improvements.

Under this contract, the land-owners charged that they have advanced, in 1866, 1867, 1868, between \$6,000 00 and \$7,000 00 to the farm. Defendant's books show that they have advanced over \$6,000 00, and that he had contracted debts, for which he claims that the partnership is liable for about \$600 00. The land-owners have received from the farm about \$2,000 00, (they and Dunn do not agree as to the exact amounts,) and there are stock, crops, and other assets on the farm worth about \$2,300 00.

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om this statement, it seems very evident that the farm not paid ten *per cent.* on the capital invested, and that owners had a right, under the contract, to terminate the partnership by giving six months notice.

Dunn has lost his labor, and received nothing but the sort of his family from the farm, the owners have lost of the capital paid in. After a careful consideration of case, we think that the Court did not err in granting an action, and appointing a Receiver to wind up the affairs of the partnership. We regret the unfortunate results of

Dunn's attempt to make his system of scientific farming profitable to himself and the owners of the farm. But we have no power to relieve him, as we are satisfied, from the facts in the case, that the notice was authorized by the agreement entered into by the parties, and that it dissolved the partnership.

Judgment affirmed.

R. BARRETT, administrator of A. P. Bailey, deceased, Plaintiff in error, vs. J. W. JACKSON *et al.*, defendants in error.

Under the 3978th section of the Code, the Judge of the Superior Court may issue a *certiorari* to correct errors in the Inferior Court, and Court of Ordinary.

Under the organization of the County-Court, that Court, and not the Inferior Court, according to the provisions of Irwin's New Code, had jurisdiction to hear and determine the question of the abatement of a nuisance, caused by a mill-dam, on the 27th December, 1867.

Certiorari. Jurisdiction. Decided by Judge PARROTT. From Superior Court. October Term, 1868.

John and Nathaniel Nicholson made complaint, before a Justice of the Inferior Court of said county, that a mill-dam, in said county, belonging to Bailey's estate, was a nuisance.

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The trial took place before three Justices of the Inferior Court, on the 27th of December, 1867.

Objection to one of the jurymen, and to some of the evidence of plaintiff, and to the circumstances attending delivery of the verdict, were made by the defendants' attorney, but they do not touch the points upon which the case turned. There was much evidence, *pro* and *con*, as to the sickness in the neighborhood of the dam, and as to whether the dam caused it. The jury found that the dam was a nuisance.

The defendants' attorney moved to arrest the judgment upon several grounds, founded upon the unreported evidence and upon the ground that said Justices had no jurisdiction to try said cause. This motion was overruled. The defendants' attorney thereupon, sued out *certiorari*, which was issued by the Clerk, but by the Judge of the Superior Court.

When this *certiorari* was called for argument, attorneys for the defendants in *certiorari* moved to dismiss it, because it was issued by the Judge and not by the Clerk. The Court refused to grant the motion. But after argument had, he refused to sustain the *certiorari*, thereby affirming the judgment below.

Attorney for defendants in error complains at the refusal of the Court to dismiss the *certiorari*, and in the same bill of exceptions the attorney for the plaintiff in error complains at the affirmation of the judgment below.

W. H. DABNEY for plaintiff in error.

W. AKIN for defendants in error.

WARNER, J.

The first ground of error assigned in this record is, that the Court below refused to dismiss the plaintiff's *certiorari*. By the 4026th section of the Code, the abatement of a nuisance caused by a mill-dam, was to be tried by the "Inferior Court," in the manner therein specified. Assuming that the "Inferior Court" of Gordon county had jurisdiction, at the time and place of trial, then, the *certiorari* was properly issued.

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the Judge of the Superior Court. The 3974th section of Code declares, that "when either party in any cause, in any inferior Court, or Court of Ordinary, shall take exceptions to any proceeding, or decision, in any cause, etc., such party may petition the Judge of the Superior Court for a writ of *certiorari*, and if the Judge shall deem the objections sufficient, he shall forthwith issue a writ of *certiorari*, directed to the Clerk of such Inferior Court," etc. As the abatement of nuisance was tried before the Inferior Court, we think the *certiorari* was properly issued by the Judge of the Superior Court in this case, and therefore, affirm the judgment of the Court below upon this assignment of error.

The plaintiff in *certiorari* in the Court below insisted, that the Inferior Court of Gordon county, at the time of the trial, held on the 27th day of December, 1867, did not have jurisdiction, to hear and determine the question of nuisance caused by a mill-dam. The Court, however, held, that the Inferior Court had jurisdiction, and that decision is assigned as error. Since the organization of the County-Court, and the powers conferred upon that Court being embraced in the Code, and the powers of the Inferior Court being *limited* by that new Code, to county matters *exclusively*, it is extremely difficult for this Court to hold, that the Inferior Court of Gordon county had jurisdiction of the subject matter of the nuisance mentioned in the record, for the purpose of hearing and determining the same, at the time the trial had. We think that a fair construction of the Code requires us to hold, that the jurisdiction of the Inferior Court over all questions not specially conferred upon that tribunal by the 345th, 346th and 347th sections of Irwin's New Code, was intended to be taken away from that Court, and vested in the County-Court. It is true, that the power to try the question of nuisance is not in terms expressly conferred upon the County-Court, or the County-Judge, but we think the power with which that Court, and Judge, is clothed by the Act organizing that Court, would authorize it to exercise jurisdiction over such judicial questions as, prior to that Act, were devolved upon the Inferior Court, the more espe-

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cially, as the jurisdiction over such questions is taken by the Inferior Court, and its jurisdiction *limited* to county matters. The 311th section of the Code declares, that the enumeration of the powers of the County-Judge shall not be *haustive*; but the County-Judge may, in general, exercise such powers as are *essential to the functions granted*, and think, it is a fair construction of the Code as it stood at time of the trial, to hold, that it was essential to the exercise of the functions of the County-Judge, which had been conferred upon him by the Code, that he should, upon compliance, as provided in the 4026th section thereof, have proceeded in the manner as prescribed therein, to hear and determine the question of the abatement of the nuisance, instead of the Inferior Court. That such was the *intention* of the Legislature, is manifested by the fact, that in regulating costs of the County-Judge by the 313th section of the Code it is provided that he shall receive three dollars in certain named cases, including "*abatement of nuisances.*"

There were several other questions made in the record, but the view which we have taken of the question of the jurisdiction of the Court, renders it unnecessary to express opinion in regard to them. Let the judgment of the Court below be reversed, on the ground of want of jurisdiction.

DAVID DAVENPORT, plaintiff in error, vs. THE STATE, defendant in error.

Where two persons were indicted for a riot, under the 4441st section of the Code, and the name of one of the defendants was spelt *Lance* in one part of the indictment, and *Lance*, in another part of it:

Held: that upon the trial of one of the defendants separately, although the evidence showed that the name of his confederate was *Lance*, there being no doubt as to the *identity* of the man, whether he was called by the one name or the other, conviction was right under the facts of the case.

Riot. Charge of the Court. Trial before Judge INGRAM, Union Superior Court. May Term, 1868.

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Davenport and another were jointly indicted for a riot, the unlawful act charged, being the beating of one Chastain. In the indictment the other defendant was called William Land, in one part of it, and William Lance in another. He pleaded guilty by the name of William Lance, taking no notice of the variance as to his name. Afterwards, Davenport was brought upon trial. It was shown that Davenport and this other defendant, coming up with Chastain, Davenport and Chastain got into a fight, Davenport having struck him several blows before Chastain resisted. Persons standing by, proposed to separate them, but this other defendant interdicted by such interference. It was not shown by the record what was the real name of the other defendant, except that the witness called him William Lance. It does not appear that their attention was called to that matter.

The Court was requested, by defendant's attorney, to charge the jury that they should look carefully into the allegations in the indictment, and to the evidence, and if they could find a material variance between them, they should find for the defendant. He further requested the Court to instruct the jury to find for the defendant, because said co-defendant was indicted as William Land, and was named William Lance, and because the offence proven (if any was) was assault and battery, or affray, and not riot.

The Court charged the jury that, "if two or more persons, with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner, such persons so offending are guilty of a riot, and that if two, or any other number of persons, were engaged in such riotous act, one coming up, and participating in such riotous act after it begun, was equally guilty, as though he had been there at the beginning;" further, that they were judges of the law and the facts, in such cases; that the whole case was before them, and that if, upon an examination of the whole case, they had a reasonable doubt as to the guilt of the defendant, they should acquit him.

The jury found the defendant guilty. Thereupon, he was granted for a new trial upon the grounds that the verdict was

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contrary to law and against the evidence, that the Court erred in refusing to charge and direct the jury as requested and in charging as he did.

WEIR BOYD for plaintiff in error.

No appearance for the State.

WARNER, J.

It is a general rule in the trial of criminal cases, that the *material* allegations in the indictment must be substantially proved, as charged therein. Upon looking into the indictment in this case, we find that the defendant is charged with having committed a riot with one Land, and also with one Lance; that is to say, the name of one of the defendants is spelt "Land" in one part of the indictment, and "Lance" in another. It is insisted that, in as much as the defendant, Davenport, was charged with having committed a riot with one Land, and the evidence showed upon the trial that his name was Lance, the variance was fatal, and the defendant should have been acquitted, and that the Court below erred in not granting a new trial in the case upon that, as well as the other grounds stated in the record. It appears that the defendant, Wm. Lance, was arraigned upon the aforesaid indictment, and plead "guilty" without raising any objection as to the name by which he was indicted. The defendant, Davenport, when arraigned, plead "not guilty," without raising any objection to the form of the indictment, or the name of the party with whom he was accused of having committed the riot. There is no doubt of the *identity* of the man who was engaged in the riot with the defendant, whether he was called by the name of Land, or Lance, and as his name is spelt both ways in the indictment, the verdict was right under the evidence. It is not the policy of our law, as manifested by the Code, to shield defendants from punishment for violations thereof, upon mere *technical* grounds alone, when the substantial rules of the law have been complied with.

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was contended, in this case, that under the evidence, the defendant was guilty of an assault and battery, and not a riot. The 441st section of the Code declares, "If any two or more persons, either with or without a common cause of quarrel, commit an unlawful act of violence, or any other act in a violent and tumultuous manner, such persons so offending, shall be guilty of a riot." We think the evidence in the record places the defendant within this provision of the Code, and there was no error in the Court below in refusing the trial upon any of the grounds taken therefor. Let the judgment of the Court below be affirmed.

HOLT, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

Where a party has been discharged and acquitted by the order of the court, as provided by the 4554th section of the Code, of an offence which he was indicted, and is afterwards indicted a second time for the same criminal acts as alleged in the first indictment, though under a different named offence, he may plead his discharge and acquittal under the first indictment, in bar of the second.

autre fois acquit. Demurrer. Decided by Judge KNIGHT.
Superior Court. October Term, 1868.

At October Term, 1865, of said Court, John Holt and six others were indicted for assault with intent to murder. The indictment charged that, on the 10th day of August, 1865, in said county, said defendants, with a loaded pistol, willfully, feloniously, and of their malice aforethought, assaulted Martha Ralston, and shot at her, etc., with intent, then and there to murder her. It was unexceptionable as to form.

At May Term, 1866, of said Court, five of the defendants, including Holt, demanded a trial, and a jury being empanelled and no trial being had at that term, the Court ordered they be tried during the next term, or discharged and acquitted of said offence. At the October Term, 1866, there

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being proper juries to try said case, the defendants being ready, and demanding trial, and no trial being had, the Court ordered that said defendants "be absolutely discharged and acquitted of the offence charged in the said indictment.

At May Term, 1867, another indictment was found, charging six persons of the same names, (as those before charged with the offence of aggravated riot. It was in proper form specifying that they, on the 10th day of August, 1866, in said county, feloniously and maliciously, with a loaded pistol, struck and beat and shot at one Margaret Ralston, with a pistol, said pistol being loaded with gun-powder and leaden ball, being an instrument likely to produce death, etc. Upon this last indictment, three of said five defendants were arraigned for trial. They plead the former indictment and orders; that they were the identical persons who had been so discharged and acquitted, and that the felony charged in said last indictment, was the identical felony charged in said first indictment, and not another and different felony, and also plead not guilty.

The Solicitor General demurred to the plea of former acquittal, and after argument, the Court sustained the demurrer, and overruled that plea, upon the ground that it was no bar to said trial. The case was then continued, as to the other two (the other two were tried, and found not guilty,) and he assigns as error the order overruling said plea of former acquittal.

GEO. D. RICE and JAS. R. BROWN, (by the Reporter plaintiffs in error, cited 2d Hale's P. C., 244; *Rix vs. State*, 2d C. & P., 634; *State vs. Ray*, 1st Rice, 1; *Roberts & Co. vs. the State*, 14 Ga. R., 8; 3d Gr. Ev., sec. 36, and *State vs. Shepard*, 7 Conn., 54.

S. C. JOHNSON, Solicitor General, for the State.

ARNER, J.

The error assigned to the judgment of the Court below is, sustaining the demurrer to the defendants' plea of *former trial* by the order and judgment of the Court, as provided in the 4554th section of the Code. In the first indictment, the defendants are charged with shooting at Margaret Ralston with a loaded pistol, on the 10th day of August, 1865, felony and of their malice aforethought, with intent to murder. In the second indictment, the defendants are charged on the same day, in the same county, with having feloniously and maliciously shot a loaded pistol at Margaret Ralston, striking and beating her. It is true that the first indictment charges the defendants with an assault with intent to murder Margaret Ralston, and the second indictment charges them with an armed riot. The plea alleges that the defendants are indicted for the *same acts* as charged in the former indictment, for which they have been *acquitted*, and the demurrer to the plea admits the truth thereof. If the defendants have been legally acquitted for the *same criminal acts* in the first indictment, as are now charged against them in the second indictment, though a different name is given to the offence in the second indictment, it is extremely difficult to see upon what principle they can be *twice* tried for the *same criminal acts*; although, *technically*, it may not be for the same offence in *name*. Can the State put a party upon the second time for the *same criminal act* after he has been *acquitted*, by changing the *name* of the accusation? If so, then his constitutional protection does not amount to anything.

The effort here is, to *evade* the provision of the constitution by changing the name of the *offence*. The record shows that the defendants have been indicted the second time for the *same identical criminal acts* for which they have been *acquitted*, but the reply is, that you are not indicted for the *same criminal offence*; therefore, the former indictment and demurrer is no bar. If the State thinks proper, by its prosecuting officer, to indict a party for an assault with intent to murder, upon a given state of facts, and upon the trial there-

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of, the defendant is *acquitted*, can the State then prefer another indictment, alleging precisely the same state of facts, (with the exception of the malicious intent,) and put the party again upon his trial for the *same criminal acts*, by altering the *name of the offence*? The State, having made its election as to the nature and character of the offence, for which it will prosecute the party upon a given state of facts, if, upon the trial, the defendant is *acquitted*, ought not the State to be bound by its *election*, and not be permitted again to indict and prosecute the defendant for the *same criminal acts*, under the name of another offence? The question to be answered is, has the defendant been arraigned and put upon his trial upon a sufficient legal accusation, for the *same criminal acts* with which he is charged the *second time*? If he has, then he has been put in jeopardy, within the true intent and meaning of the constitution, and cannot be tried the second time for the same criminal acts, under the same, or a different named offence. To hold otherwise, would be to hold that provision of the constitution which declares, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," for all *practical* purposes, to be a mere *shadow*, and *delusion*. These views, are in accordance with the ruling of this Court, in *Roberts & Copenhagen vs. the State*, 14th Ga. Rep., 8. In that case this Court stated the rule to be, "that the plea of *autrefois acquit* or *convict* is sufficient, whenever the proof shews the second case to be the *same transaction* with the first." Let the judgment of the Court below be reversed.

JOHN M. HUIE *et al.*, plaintiffs in error, vs. SARAH E. LOUD, defendant in error.

M. purchased of W. a tract of land on time, giving his note for the purchase money, and taking the vendor's bond for titles, went into the possession of the same, made valuable improvements upon the land, and afterwards L., a married woman, purchased the property as her separate estate from M., and paid the original purchase money to W., the original vendor, who executed a deed to M., and M., the first purchaser of the land, executed a deed to L., the married woman, receiving the sum of \$31,000 00, in Confederate money. Subsequently the land was levied on to satisfy a judgment obtained against M., the first purchaser of the land from W., in favor of H., and was advertised for sale as the property of M. L. filed her bill on the equity side of the Court, enjoining the sale, and praying a perpetual injunction against the sale thereof, on the ground that, in view of the facts of the case, the land was not subject to be sold in satisfaction of the creditor's judgment. The Court below decreed a perpetual injunction:

Held: that the judgment of the Court below, perpetually enjoining the judgment creditor, was error; that the Court below, upon the state of facts presented, should have ordered and decreed that the land be sold, and out of the proceeds of such sale, Mrs. L. be *first* paid the amount of the original purchase money, to which W. would have been entitled under his contract, with interest thereon up to the time of sale, and that the balance of the proceeds of the sale of the land be paid to the judgment creditors of M., according to their legal priority, in existence prior to Mrs. L.'s purchase of the land.

Equity. Injunction. Decided by Judge COLLIER. From Clayton county.

The bill made the following case: James H. Waldrop sold to Wiley P. Mangum north quarter of lot No. 242, on credit, giving bond for titles, and taking Mangum's note for the purchase-money. This note was not paid, Jas. F. Johnson, Esq., was employed to collect it. On the 4th July, 1862, said Waldrop made a regular fee-simple conveyance of said land to said Mangum, and delivered it to said Johnson, as Waldrop's attorney. This deed was so made and left, when Waldrop was going to the army, and in order that Johnson could, by levy and sale, enforce the lien on the land for the purchase-money.

Johnson was about to do this, when, to-wit: on 9th Nov-

ember, 1863, P. H. Loud, as agent for his wife, Sara Loud, (who held a separate estate,) agreed with Johnson attorney of Waldrop, and A. S. Mangum, as agent, said Wiley P. Mangum, that Loud, as agent, should chase said land, and "be subrogated to all the rights equities of the said Waldrop," by paying to Johnson such attorney, said purchase-money due Waldrop. In suance of this agreement, Johnson transferred to said Loud as agent for his wife, said judgment. Loud, supposing be a judgment for the full amount of the purchase-money aforesaid and costs, paid the full amount and costs to Johnson, as attorney. However, there never was a judgment thereon, except for costs. Johnson delivered said deed to Loud. Afterwards, on the 9th of November, 1863, said P. Mangum, in consideration of \$3,750 00, by her deed to him and to Johnson, as aforesaid, conveyed said land in fee to Mrs. Loud. She took said deed, she says, to make chain of title complete. At said date, W. P. Mangum was insolvent, and since absconded, and removed to Louisiana. He never was in possession of said land, and yet John Huie has levied on it a *fi. fa.*, in his favor, against said Wiley Mangum, A. S. Mangum *et al.*, founded upon a judgment obtained at May Term, 1862, of Clayton Superior Court, which was proceeding to sell said lot thereby.

The prayer was, that Huie be enjoined from selling said land, and that Wm. T. Waldrop, administrator of J. T. Waldrop, be compelled to convey the land to Loud as trustee for his wife.

Injunction was ordered by Hiram Warner, then Judge of the Superior Courts of the Coweta circuit. The answer did not deny nor admit the statements of the bill. At trial, it was agreed that Judge Collier, then presiding, should hear testimony, and decide, both as to the law and fact of the case, and direct a decree accordingly.

After reading the pleadings aforesaid, said P. H. Loud testified, that in 1860, as agent or trustee for his wife, he bought of A. S. Mangum, as agent for W. P. Mangum, said land, giving therefor \$3,700 00, in Confederate currency.

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of which he paid Johnson, for Jas. H. Waldrop, about \$100 00, that being the amount of a claim for purchase-money, which Loud understood Johnson held, as attorney for said Waldrop; that Johnson then delivered to him said mentioned deed; that he afterwards took said second deed from Mangum, and had both of them recorded. He testified, that he paid for the said lot with the separate funds of his wife, and specified the buildings and improvements thereon.

JAMES F. JOHNSON, examined, testified that he had the deed for collection, etc., as stated; that when Mangum bought the lot, it was unimproved, but that Mangum's father (the old man lived there—W. P. Mangum was in the army,) had improved it; said deed was delivered to Johnson, as Waldrop's attorney; was never delivered to W. P. Mangum, nor to any one for him, nor had been filed in the Clerk's office; Mangum never paid any part of the purchase-money; but it was all paid by Loud, as trustee for his wife, and the deed was delivered to Loud, as trustee, he having stepped into Mangum's shoes; paid Mangum a profit on his bargain with Waldrop, and paid off, and discharged Mangum's liability to Waldrop for the purchase-money.

The Judge directed the jury to sign a decree that Huie's *fi. fa.* be perpetually enjoined. Of this, complaint is here made.

TIDWELL & FEARS, HUIE, for plaintiffs in error.

M. ARNOLD, for defendant in error.

WARNER, J.

The questions of law, and the facts involved in this case, were, by agreement, submitted to the Chancellor in the Court below, who, upon consideration of the same, directed the jury to sign a decree perpetually enjoining Huie, the judgment creditor, from collecting his *fi. fa.* out of the property claimed by Mrs. Loud. This judgment of the Court is assigned for error here. The facts in the case, as presented by the record,

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are in substance as follows: Mangum purchased of Waldrop a tract of land on credit, giving his note for the purchase money, taking Waldrop's bond for titles, went into possession of the same, and made valuable improvements thereon. Afterwards, Mrs. Loud, a married woman, purchased the property from Mangum, as her separate estate and paid the amount of the original purchase money from Mangum to Waldrop. Whereupon, Waldrop executed and delivered a deed to the land to Mangum, and Mangum executed a deed conveying the land to Mrs. Loud, receiving from her, as the consideration therefor, the sum of thirty one hundred dollars in Confederate money. Subsequently the land was levied on to satisfy a judgment obtained against Mangum in favor of Huie, and was advertised for sale of the property of Mangum. Mrs. Loud filed her bill enjoining the sale, and prayed a *perpetual* injunction against sale of the property under Huie's judgment and *fi. fa.*

The question in the case is, whether Mangum had such *interest* in the land and improvements thereon as was subject to levy and sale in favor of his judgment creditors? In our judgment, after the payment of the original purchase money, with interest due thereon up to the time of such payment, by Mrs. Loud, in discharge of the Waldrop debt, she acquired all rights which Waldrop had in the land, and no more against Mangum's *judgment creditors*. If the land and improvements put thereon by Mangum was worth more than the amount of the Waldrop debt paid by Mrs. Loud, such excess of value of the property was subject to the payment of judgments obtained against Mangum *prior* to the sale of property by Mangum to Mrs. Loud.

In view of the facts of this case, it is our opinion and judgment, that the Court below should have ordered and decreed a sale of the property, and that out of the proceeds of a sale, Mrs. Loud be *first* paid the amount of the original purchase money to which Waldrop would have been entitled under his contract, with interest thereon up to the time of sale, and that the balance of the proceeds of the sale of land be paid to the judgment creditors of Mangum, acc

o their legal priority, in existence anterior to Mrs. Loud's base of the land from Mangum.

t the judgment of the Court below be reversed.

J. RUSSEL, plaintiff in error, vs. EUSEBIUS SLATON, defendant in error.

en a bill was filed, to enjoin a writ of possession in an ejectment, after the judgment therein had been affirmed by the Supreme Court, alleging that the Supreme Court had, in its judgment, mistaken overlooked material facts in the record.

that the bill was properly dismissed on demurrer.

a judgment of the Supreme Court in a case, is a judgment *affirming* or *reversing* the judgment below, and is final and conclusive between the parties on the matters involved in that trial. The opinion of the Court, on the law of the case, does not stand on the same footing, may be overruled, after argument, if shewn to be erroneous, even unanimously.

quity. Demurrer. Decided by Judge Collier. Fayette Superior Court, March Term, 1868.

Russel filed a bill, making the following averments: On 5th of October, 1835, John T. Davis bought land-lot 120, 7th District, Fayette county, at sheriff's sale, as the property of James McCarcell, the drawer, before the grant for same had issued from the State, and under said sale took immediate possession. The grant issued, and afterwards, on 7th of February, 1837, it was again sold by the sheriff, as property of said drawer, and Davis bought it again, paid the purchase money, but took no deed from the sheriff. Davis remained continuously in possession till the 1st of 1844 or first of 1845. About the 1st of October, 1845, said Davis and another owed Case & Stratton \$1,500 00 and gave them their note for that sum. Upon the unpaid of this note a judgment was obtained, on the 1st of December, 1847, in favor of T. M. Jones, a nominal plaintiff.

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Russel bought said *fi. fa.*, taking a transfer from Jones, and from Case, for his firm, and levied on said lot as the property of Davis, who was in possession. Slaton filed a claim in the land; it was tried, and the land was found subject to said *fi. fa.*, and, under it, the land was regularly sold by the sheriff, and bid off by Russel, at \$250 00. On the 12th of April, 1853, the sheriff made a deed to Russel, and put him in possession of the land. Under said sale Russel is, and ever has been, in possession of the same. On the 28th of August, 1855, Slaton brought ejectment against Russel for this lot, and recovered the same with mesne profits.

He then recited all that took place in the aforesaid ejectment cause, almost in the words of the report of the same in *25th Georgia. Report*, 193, and that the judgment of the Supreme Court was made the judgment of the Superior Court, and thereupon, a writ of possession had issued to put him out, and Slaton in, possession of said land, and that the deed from Westbrook, sheriff, to May & Lambeth, was in fraud of the creditors of said Davis.

Because of these things, and because, as Russel averred, said Supreme Court, by accident or mistake, overlooked the fact that complainant proposed, and offered to prove in the Court below, that the debt by which the land was sold, when Russel became the purchaser, existed at the time, and for many years before, said Davis abandoned or left the possession of said land, and that the Judge of the Superior Court refused to allow Russel to make that proof, (that Court saying that the only question in the case was the statute of limitations, thereby misleading Russel's attorneys,) and because said Court based its judgments, in part, on the fact that no such debts had been shown, overlooking said offer to show them, and because of the refusal of the Judge to allow the proof made, and because the Supreme Court also overlooked the fact that, on said trial, Russel proposed, by proof, to carry title down to Slaton, and that this evidence was rejected; to prevent another action of ejectment, and to quiet his possession, Russel prayed that said writ should be enjoined, and that Slaton be decreed to be barred in the premises by

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the verdict in said claim case. The injunction was granted, answer was filed, and so matters stood till the term aforesaid. The answer denied any fraud or knowledge of any debts charged, stated how Slaton got a title, etc.

The cause came up on a motion to dismiss the bill for want of equity, and, if it had any equity, upon the ground that the oath was sworn off. The Court dissolved the injunction and dismissed the bill, and this is assigned as error. .

TIDWELL & FEARS, A. W. HAMMOND & SON, for plaintiffs in error, cited secs. 3040-1, 3062 Code; 15 *Ga. R.*, 7; 10 *Ga. R.*, 399; 3 John R, 588; 2 Story's Eq., 859; 1 *Ga. R.*, 143; 19 *Ga. R.*, 124; 25 *Ga. R.*, 193.

J. M. & W. L. CALHOUN for defendant in error.

McCAY, J.

This is a bill filed under the following circumstances. Slaton brought ejectment, with several demises, against Russel. The case was tried, and verdict was for the plaintiff in ejectment. Russel, the defendant, brought the case, by bill of exceptions, to this Court, where, at March Term, 1858, it was argued, and the judgment of the Court below was affirmed by this Court. That judgment was, at the next term of Fayette Superior Court, made the judgment of that Court, and writ of possession issued. Russel then filed this bill, setting forth a history of the trial, and alleging that the Supreme Court had, in its judgment of affirmance, *made a mistake* as to certain material facts in the record, and praying a perpetual injunction against the plaintiff in the ejectment cause. At March Term, 1868, this bill was demurred to, and demurrer was sanctioned. To that judgment exceptions were filed.

This is rather an extraordinary case. The title to this lot of land seems to have been always in dispute, no matter who is in possession of it. We are not disposed to protract this terminable warfare. The demurrer was properly sustained. The real ground of the bill is, that the Supreme Court erred in its judgment of affirmance at the March Term, 1858. The

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mistake of fact alleged was a small matter, and could have had no effect upon the judgment. If a man has held adversely for seven years, and then abandons it, the presumption is that his possession was only *seemingly* adverse, and he has resigned his claim, and the existence or non-existence of creditors can have but little to do with it.

But we place our affirmance of the judgment of the Court on higher grounds.

1. The judgment of affirmance or reversal, *by this Court* the judgment of the Court below, is not the subject of review. This is a Court of the last resort, and it would be an extraordinary law, indeed, that would justify such a review. It is not that this Court is infallible, but that such a proceeding would be child's play.

2. Certainly the argument of the Judge who writes the reasons for the judgment, however false in logic or in fact, cannot be a ground for re-hearing *that case*. If the law in the case is adjudged wrongly, the Code provides that a *question of law* may, on motion, be re-heard, but until it is done, it is binding on the Court even for future cases.

We are aware that there have been cases when Courts, of the last resort, have allowed their judgments to be opened and reheard. We think, however, that those cases are exceptional where there was fraud, no parties, or some state of facts which made the judgment a nullity.* 1st Grattan, 81. 3d Grattan, 323. 7th Grattan, 84.

We do not say that there might not arise a case, in which it might be made the ground of a proceeding in the present Court, that the *judgment* of this Court, in a case before it, was made upon a mistake of fact—as, for instance, the liability of a party—or was procured by fraud. This is by no means such a case. This case, if sustained, would be on the ground that the Court had not read the record; and did not, in fact, know what it was doing.

Judgment affirmed.

CAMPBELL WALLACE, Superintendent of the Western and Atlantic Railroad, plaintiff in error, vs. MARY E. CANNON, defendant in error.

Judge C. J., having once argued this cause in the Supreme Court, declined presiding.

When two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness, or negligence of the other, the Court will not lend assistance in favor of either party to recover damages. The maxim of the law in all such cases is, "*In pari delicto potior est conditio defendentis et possidentis.*"

Motion for new trial. Charge of the Court. By Judge COLLIER. Fulton Superior Court. October Term, 1867.

Those curious about the history of this case, are referred to *Cannon vs. Rowland, Sup. W. & A. R. R., 34th Ga. R. 422 S. C. 35th Ga. R., 105.*

The new superintendent was made a party, Rowland having died. It was an action by Mary E. Cannon, widow of Sylvester Cannon, an employec of the Western and Atlantic Railroad, because of his death by the alleged carelessness of the employees of the said railroad, on the 6th of July, 1862, while he was acting as engineer, on a train from Atlanta, Georgia, to Chattanooga, Tennessee. Besides the general issue, the defendant plead that, at the time of the killing, there was no legal government of, or in, the State of Georgia, and no legal superintendent, agents or employees of the Western and Atlantic Railroad, and that said collision and killing did not take place by reason of any fault, negligence or misconduct of any lawful officer, agent or employee of the Western and Atlantic Railroad; that at said time, the government of the State of Georgia, and superintendence, control and management of the Western and Atlantic Railroad were in the hands of persons, inhabitants of Georgia, then engaged in insurrection against the Government of the United States; that, at said time, said Sylvester Cannon was, by acting and serving as engineer on said railroad, unlawfully aiding and

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abetting the enemies of the United States, because persons with whom and under whom he was so acting and acting, were then engaged in acts of hostility, and were in insurrection against the United States, and because said Cannon was, as such engineer, assisting in the transportation of troops knowingly and willingly, to wage war against the United States; that said Sylvester Cannon was, at that time, a habitant of the State of Georgia, and was in insurrection against the United States; that, at that time, Georgia was a State in which the laws of the United States were opposed and their execution obstructed by insurgents and rebels against the United States, too powerful to be suppressed by the ordinary course of judicial proceedings; that, by acting as such engineer, and assisting in conveying and transporting insurrectionary troops to fight against the forces of the United States, he was resisting and interfering with the unrestricted use by the Government of the United States of said railroad contrary to the Act of Congress, approved 31st of January 1862, entitled, "An Act to authorize the President of the United States in certain cases to take possession of railroad telegraph lines, and for other purposes;" that, at said time Cannon owed allegiance to the United States, and was engaged in levying war against the United States, and in giving the enemies thereof aid and comfort; that Cannon, at that time, was negligent and actively in fault, and did, by his conduct, contribute to his own destruction; and lastly any debt or liability that may have been incurred by reason of plaintiff's allegations, was, in fact, incurred while Cannon was on the late war of secession against the United States of America, and in aiding and abetting and promoting said insurrection. It was shewn that Cannon was killed by a collision on the road, on Sunday, the 6th of July, 1862; that he was at that time acting as engineer of the train from Atlanta to Chattanooga freighted with passengers, most of whom were Confederate soldiers, who had no guns but two or three cannon, but horses and harness, and wore the Confederate uniform. Of the cars were passenger cars, twenty-one other cars carried the soldiers. The train was the regular mail train, and

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many letters and packages and military orders to Confederate soldiers and Generals; that the down train collided with his, was a freight train, which had been sent from Atlanta to Chattanooga, freighted with Confederate soldiers, and was then returning empty to Atlanta; that he had been informed of that day by Col. Camden, the agent of the Western and Atlantic Railroad at Chattanooga; that Cannon's train had been delayed at Chattanooga, and that the turnout was too short to allow the passage of that day; that this turnout had been sufficient for passenger trains, but that the large amount of freight and soldiers loaded on that day had to carry for the Confederate Government, so that the number and length of the trains, that said turnout was too short, and that Cannon was aware of this difficulty; that the road was then in the habit of carrying Confederate soldiers, and there were so many of them, and so much freight for the Confederate Government, that a collision was produced, yet, by care and observance of the trains could have been run without collision. In the event of negligence, it was shewn that Cannon was on duty that day, by order of the Master Machinist, and that he was behind his schedule time, he had been put back behind others, or the action of others, getting in his way. Being Sunday, it was unlawful for the freight train to run, and that besides, he had passed all the regular passenger trains, and, by a rule of the road, it was provided that any irregular train should be given by telegraph, and that notice was given to Cannon's train. There was no negligence as to the rules, as to speed of trains, and as to the condition of Cannon's train at the time, and as to the age, character, and qualifications of Cannon, to show the *quantum* of damages to his wife by reason of this loss.

The court charged the jury, among other things, that it was for the plaintiff to show that said Cannon was killed while running of the cars of the Western and Atlantic Railroad, that without fault or negligence on his part, he was an employee of said road and engaged thereon, and as to the time; that the transportation of Confederate soldiers by the Western and Atlantic Railroad in 1862, for

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the purpose of making war upon the government or authorities of the United States, was contrary to the public policy and laws of the United States, and therefore illegal, and if Cannon was voluntarily engaged in the performance of acts in violation of the Constitution and laws of the United States, when he was killed, and from that cause solely, or from the fault or negligence of said Cannon, at the time he lost his life, plaintiff could not recover; that if the killing resulted solely from the fault or negligence of defendant, or its employees, then plaintiff could recover.

The verdict was for \$5,000 00 in behalf of the plaintiff.

The defendant moved for a new trial, upon the grounds that the verdict was contrary to the evidence, etc., and because of the use of the "solely," in said charge, in the two places where it occurs.

The Court refused a new trial, and this is assigned as error, on the grounds aforesaid.

P. L. MYNATT, L. E. BLECKEY, for plaintiff in error. Constitution of U. S., art. 3, sec. 3, and Act of Congress of April 30th, 1790, sec. 1st and 2d, as to treason; Act of Congress, 31st January, 1862, 2 Brightly's Dig., 192, *Mrs. Alexander's Cotton Case*, 2 Wallace, show the policy of the U. S. This unlawful business prevents the recovery. *Hilliard on Torts*, vol. 1, 161-162. *Gregg & Wyman*, 4 Cush. R., 322. *Bosworth vs. Swansey*, 10 Metcalf R., 363. *Foster vs. Thurston*, 11th Cush. R., 322. *Lord vs. Chadburne*, 42 Maine R., 429. *Saily vs. Smith*, 11 John. R., 500. *DeWentz vs. Hendricks*, 2 Bing. R., 314. *Holman vs. Johnson*, 1 Cowper, 341. *Peters' C. C. R.*, 410, 3d Washington's C. C. R., 276. The Court should not have used "solely," *Davis vs. Garrett*, 6 Bing., 716. (19 E. C. L. R., 215.) This case is covered by the Repudiating Ordinance of 1865, see Journal, 234. It is a debt by fair construction. *S. W. R. R. Co. vs. Paulk*, 24 Ga. R. 356. 2 *Kelly*, 81, 85, 88. *Ib.*, 252, 255-6, 271. 3 *Kelly*, 380, 493. 5th Ga. R., 368-9. 6 Ga. R. 103. 9th Ga. R., 515. 15th Ga. R., 4. 34th Ga., 405. Lastly, they contended that the 3d section of the Act of 1856 is uncon-

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tional. *Prothro et al. vs. Orr et al.*, 12th Ga. R. 36.
r Court vs. Hunt et al., 29th Ga., 158.

ROBERT BAUGH, S. B. HOYT, for defendant in error, furnished no brief to the Reporter.

ARNER, J.

is was an action brought by the widow of Sylvester Cannon, an employee of the Western and Atlantic Railroad, at that road, to recover damages for killing her husband, the negligence of another employee of the road, under provisions of the Code. On the trial of the case in the Court below, it was insisted that the plaintiff was not entitled to recover, because her husband, at the time he was killed, voluntarily engaged in the *unlawful* act of transporting Confederate soldiers and munitions of war, for the purpose of fighting war against the Government of the United States. If her husband of the plaintiff, at the time he was killed, and her employees of the company, at the time of the injury, were *voluntarily* engaged in transporting Confederate soldiers and munitions of war upon the road, for the purpose of fighting war upon the Government of the United States, voluntary engagement, on their part, was an *illegal* act, in violation of the Constitution of the United States, the supreme law of the land. The Court below charged the jury to this point in the case, "If you shall believe from the evidence in this case, that the deceased was voluntarily engaged in the performance of acts in violation of the Constitution of the United States when he was killed, and that that cause *solely*, or from the fault or negligence of the deceased Sylvester at the time he lost his life, then the plaintiff is entitled to recover. If the killing resulted *solely* from the fault or negligence of the defendant, or of an employee of the defendant, then the plaintiff is entitled to recover." The charge of the Court is excepted to, and assigned for error here.

The charge of the Court, so far as the same relates to the illegal employment of Cannon, and the other employees

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of the road, at the time of the injury, in view of the evidence in the record, was error. The question involved in that branch of the case was, whether the parties were *voluntarily* engaged, at the time of the injury, in an *unlawful* transaction, in violation of the Constitution and laws of the United States; that was a *distinct ground* of defence against the plaintiff's right to recover. The injury was caused by the collision of the two trains running upon the road. The evidence is, that Cannon's train was freighted with Confederate soldiers, two or three cannon, besides horses and harness, etc. Murphy testifies, "that in 1862, the road was in the habit of carrying Confederate soldiers; there were so many soldiers, and so much freight of the Confederate Government, that a great deal of confusion was produced." Wing, the conductor on the down train, testifies, "that he had been carrying a load of Confederate soldiers to Chattanooga, and was returning with an *empty train*; that he was ordered out by Col. Camden, the agent of the road at Chattanooga." In view of the evidence contained in the record, as to the illegal employment of the parties at the time the alleged injury occurred, the Court, in our judgment, should have charged the jury, that if they believed, from the evidence, that, at the time Cannon was killed by the collision of the railroad trains, the railroad company and the employees of that company, (including Cannon, as well as the other employees, whose negligence caused the injury,) were *voluntarily* engaged in the transportation of Confederate soldiers on the road for the purpose of making war upon the Government of the United States, then the plaintiff is not entitled to recover.

There was much said, on the argument of the case, about the down freight-train running on Sunday, in violation of the statute of this State. We do not recognize the doctrine, that one offender against the law, can *set-off* against the plaintiff that he, too, is a public offender, in another *distinct transaction*. See *Mahony vs. Cook*, 26 Pennsylvania R., 342; *The Philadelphia, Washington and Baltimore Railroad Company vs. The Philadelphia Steam Tow-boat Company*, 23 Howard's U. S. R., 209. To bring the parties with-

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in the rule of the law applicable to such cases, they must have been engaged in *the same illegal* transaction; it is in such cases only, that the maxim of the law, "*In pari delicto prior est conditio defendentis et possidentis*" applies. In all such cases, the rule of the law is, to leave the parties where it finds them, giving no relief, and no countenance to claims of that character; not for the benefit of the defendant, but upon grounds of public policy. Let the judgment of the Court below be reversed.

IRWIN H. WOODWARD, plaintiff in error, vs. SAMUEL M. GATES et al., defendants in error.

1. In an action for waste, a witness should state facts, and while he may give his opinion, accompanied by the facts upon which it is predicated, as to the number of acres from which the timber has been cut, the value of the land before and after it was cut, the whole number of acres in the tract, the proportions of timbered land and the like; it is error in the Court to permit him to give, in evidence, his opinion that the estate of the remainder-man has been damaged a certain amount by the defendant. It is the province of the jury to draw, from the facts stated, their own conclusion, as to the amount of damage, if any, sustained by the plaintiff.
2. If the complainant, in a bill in equity, intends to waive the answer of the defendant under oath, he must so state distinctly. The statement that he is *able* to prove the allegations in his bill, without the answer of the defendant, is not a compliance with the Code.
3. If complainant waives an answer under oath, the answer filed, is not evidence. It may be used, however, as an admission of record, and complainant is not bound to prove any fact admitted. But when so used, the admission must be taken, together with any qualifications or explanations accompanying it.
4. The statute of Gloucester, as to the forfeiture, was not of force in Georgia prior to the adoption of the Code, and it was error in the Court to instruct the jury that they might find a forfeiture of the life-estate upon evidence of acts, most, if not all, of which were done prior to that date. The evidence upon which the forfeiture was claimed should have been confined to acts of waste since 1st January, 1868.
5. The stringent rules of the English law, relative to waste, were not applicable to our condition; and were not embraced in our adopting

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statute. It is not always waste in this State for a tenant-for-life to cut growing timber, or clear land. Regard must be had to the condition of the premises ; and the proper question for the jury to decide, under the instruction of the Court, will be, did good husbandry require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed ?

Equity. Waste. Tried before Judge COLLIER. Meriwether Superior Court. August Term, 1867.

A. Gates and Catharine Gates, minor children of Samuel M. Gates, deceased, and Samuel M. Gates, James B. Gates, Mary E. Gates, Nancy C. Gates and Matilda H. Gates, minor children of Benjamin K. Gates, deceased, by their guardian and next friend, filed a bill against Irwin H. Woodward, by which they made the following averments: In 1854, their grand-father, Benjamin Gates, died, leaving a will, of which the third item was as follows :

“I give and bequeath to my beloved wife, Emeline Gates, for and during her natural life only, (here follows a description of certain lands in Meriwether county, Georgia,) containing, in all, two thousand and twenty-two and one quarter acres, more or less, with all the rights and members thereunto belonging. And also, forty-one negroes, to-wit: (naming them, etc.,) and their increase, and also all my household and kitchen furniture, the blacksmith tools at my house place, my cotton gins and all the out-houses, furniture at my home-place, salamanda safe, double barrellled shot-gun and revolvers ; and at the death of my wife, all the aforesaid property to go to my grand-children Benjamin K. Gates and Samuel M. Gates, during their natural lives, and at the death of each one of them, his portion to his children, the salamanda safe to Benjamin K. Gates, and the balance equally between said Benjamin K. Gates and Samuel M. Gates.”

The will was proven, and the executor at once put said Emeline into possession of said lands. Soon afterwards, the widow married said Woodward, who owned a number of slaves and was largely in debt.

At the date of the marriage, a reasonable proportion of said lands still had the original forest growth thereon, but there was cleared land sufficient to employ the slaves bequeathed to said Emeline. Said lands, if properly preserved, would be of great value to the remainder-men. But Woodward soon

terminated to use said lands, without reference to the preservation of the reversionary interest, but so as to make the most of it for himself during his wife's life. Accordingly, Woodward moved his family, by a former wife, and his own slaves, to said premises, and, from time to time, hired other slaves and employed the accumulated force of said slaves in cutting down the forest growth and clearing said land. Once complainants' neighbors and relatives remonstrated with Woodward about this waste, and Woodward promised to desist, and did so for a short time; but the complainants' fathers both having died, leaving these minor children, Woodward renewed his acts of waste, and is continuing them, and will render the reversion almost, if not entirely, worthless, unless he be restrained. Since the emancipation of slaves, he is more wanton in said acts, and avows a purpose to hire freedmen for the express purpose of clearing more of the land. The waste already done by him has damaged the reversion \$10,000 00.

(They further averred that Woodward had received, as the proceeds of said waste, large sums of money, which he had invested in lands and other property elsewhere, and had taken the titles in his own name in fee, and was thus seeking to transfer the real value of the lands so held for the life of said Emeline, to other lands and other property, to which he may acquire the title in fee. And they prayed that Woodward should "set forth in his answer to this bill his annual income from said estate, and the manner of investing the same, and what property he has accumulated, its kind and character, and the titles taken since he has intermarried with said Emeline, and that he be required to convey to them any lands and other property secured to himself by reason of said waste, " And in the prayer for *subpoena*, at the close of the whole bill, they prayed that Woodward should appear and answer the premises under his corporal oath.")

They stated that they "were able to prove, without the answer of said defendant," the other allegations. They concluded that the life-estate was forfeited by said waste, and prayed that it should be so decreed, and that he should be

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enjoined from future waste, and be made to pay for the past waste, etc.

The defendant demurred generally upon the grounds that the complainants had an adequate common law remedy, and shewed no reason for the relief sought, and specially to so much of the bill as sought discovery and recovery of the amount of income from the estate mentioned in said bill, and the investments made by said defendant of the same, and to so much of said bill as sought a forfeiture of the life-estate.

The Court sustained the special demurrer, and struck out those parts of the bill and of the prayer which are stated within brackets *ante*.

Woodward then answered the bill. He admitted the allegations as stated, except as follows: He married said widow in April, 1855, she then being about forty-five years old; he then lived in Monroe county, Georgia, and was amply able to pay all his debts without inconvenience or sacrificing any portion of his estate; he took his wife to his said house, and staid there till the next year, and then moved with her and his three children to said Meriwether place; that he carried with him one negro man, his carriage-driver, and a woman, his cook, and their six children, and he purchased another man and his wife and three children, and also purchased two negro girls and two children: used these girls as seamstresses only; besides those, he did not take to said place any slaves, either his own or hired, though he then owned twenty-five or thirty slaves. In 1857, he purchased about fourteen hundred acres, the Petit place, adjoining said premises, and early in 1858, removed his slaves to the Petit place. He stated that when he went to the Gates place, it had twelve or thirteen hundred acres cleared, and nine hundred acres in the forest growth; some six or seven hundred acres of the cleared land was worn out and seemed to have been turned out some time before, unfit for cultivation, grown up in pine and other bushes, etc.; of the remainder, there was about two hundred acres of fresh land, and in good order for cultivation, the balance, though much worn, by manuring and preparing, would pay for cultivation; but there was not sufficient land cleared to keep the

lands employed, etc. He gave a detailed statement of his management of it, and the Petit place, so as to show that he was not clearing too much of said premises, and stated that during a part of the time, while he was so clearing, complainants' fathers passed by, saw it being done, and made no objection; that since 1858, he had not cleared in all over one hundred acres on said Gates place, and had improved the swamp by ditching, etc.; the clearing in part, was removing timber prostrated by an hurricane.

On the trial, Dr. PARKS testified, that he had known the land many years, and lived next to it, that Woodward commenced clearing on the premises in 1855, and in that year and in 1856, cleared one hundred and forty or one hundred and fifty acres, and was clearing on the land in the fall of 1856; that a part of this, say almost all, or about forty or fifty acres, was land on which the timber had been torn down by an hurricane, and it was proper and good husbandry to clear this up, and use the timber in repairing the place; about one hundred acres cleared by him was swamp-land, which required great labor to clear and reduce it to cultivation. He said he thought that the land was worth, when Woodward took possession of it, \$3 00 or \$4 00 per acre, but now nothing; perhaps, fifty cents per acre, as there is not sufficient timber to keep it up; that, in his opinion, the reversionary estate had been damaged, by Woodward's waste, \$3,000 00 or \$4,000 00. He thought it would take the timber of thirty-five acres *per annum* to keep up the farm.

A Mr. Jones testified, that Woodward had cleared about one hundred acres on said land; that the timber on fifteen or twenty acres would be needed *per annum* to keep the place in repair, and he stated that, in his opinion, the reversionary estate had been damaged, by Woodward's clearing, \$1,000 00.

There was some other testimony, but that is not material now. The defendant's solicitor objected to the said opinions of Parks and Jones, but the Court allowed them given in as evidence.

The Court charged the jury, among other things, as follows: That portion of the bill which originally prayed for a discov-

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ery having been stricken out, upon demurrer, the bill is correct, which the complainants undertake to prove the facts necessary for a recovery. The answer is simply pleading, no defence for the defendant; the admissions in the answer against his interest, is evidence for the complainants. Waste is a thing which works a permanent injury to the substance of the inheritance, willfully committed or carelessly allowed. Does the testimony show that there has been a waste or an unnecessary use or consumption of the substance of the inheritance of complainants by the defendant, and that without regard to the rights of complainants? If so, that is waste.

He then read section 2235 of the Code to the jury and added: If you should believe, from the evidence, that a life-tenant has failed to exercise the ordinary care of a prudent man, in the use and enjoyment of such estate, for the protection and preservation of the estate of the remaindermen, or willfully or carelessly permitted acts of waste to take place, he forfeits his interest to the remaindermen, and they are entitled to immediate possession.

The jury found that the life-estate was forfeited, and Woodward should pay complainants \$2,000 00 and costs. A new trial was moved for, upon the grounds that the verdict was contrary to the evidence, etc., and because the court had erred in each of said propositions stated in his charge, because he erred in allowing Parks and Jones to give their said opinions. The Court refused a new trial, and the case was assigned as error, on said grounds.

W. DOUGHERTY, B. H. BIGHAM, for plaintiffs in error.

B. H. HILL for defendant in error.

BROWN, C. J.

It was competent for the witnesses to give their opinions, accompanied by the facts upon which it was predicated, the whole number of acres from which the timber had been cut by Woodward, the value of the land before and after it was cut, the proportion which the timbered land bore to the whole.

deared land on each tract, and the like. But it was error in the Court to permit the witnesses to give their opinions that the estate of the remainder-men had been damaged a certain amount by the acts of the life-tenant. The amount of damage, if any, was the very question to be found by the jury. It was the conclusion to be drawn from all the facts given in evidence. It was the province of the twelve jurors, after weighing all the evidence, to form that opinion, or draw that conclusion, and not the province of the witness. 10 Ga. R., 529.

2. We do not think the complainant by his bill waived the answer of the defendant in this case. It is true he states he is *able* to prove the allegations of the bill without the answer of the defendant. This may be true, and he may still have a right to insist on the answer. If the bill were for discovery only, and it contained this statement, he might not have a right to maintain it. But, having alleged other equitable grounds for the interference of a Court of Chancery, and having obtained a *status* in that Court, he has a right to the answer of the defendant, unless he specially waives it. Section 3046 of the Revised Code provides, that a party seeking relief, may waive discovery; and in such case the defendant's answer is not evidence. Section 4136 declares that defendant need not verify his answer, if discovery is *specially disclaimed*. The mere statement that the complainant is *able* to prove the allegations contained in his bill, is not such special disclaimer as the Code contemplates.

3. When the answer is specially disclaimed, it is not evidence for the defendant. But like any other pleading, it is an admission of record, so far as it contains statements or allegations favorable to the complainant, who is not held to prove any fact admitted by the answer. If, however, the complainant insists on the answer as an admission of record, he must take it as a whole; and he will not be permitted to insist on the admitted fact, to the exclusion of any qualifications or explanations accompanying it.

4. We are satisfied the charge of the Court was too sweeping as to the forfeiture of the estate by Woodward. The

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evidence of waste in this case, related mainly, if not entirely, to a period anterior to the adoption of the Code, (first January, 1863.) Prior to that time there was no law in this State which operated a forfeiture of the life-estate by the commission of waste. The life-tenant was liable for the damage done, but not to the forfeiture of the life-estate.

This question was decided by this Court in the case of a widow, who had a life-estate in dower, and had committed waste, in *Parker et al. vs. Chambliss*, 12 Ga., 235. In that case the question was whether the widow, the waste being admitted, did not forfeit her estate under the statute of Gloucester, and the Court held that she did not. They ruled that the statute of Gloucester was of force under our adopting statute, so far as it makes a tenant-in-dower *liable* for waste committed, but they rejected the harsh and penal *remedy* provided by the statute. We concur in this view. The State of Georgia has her own system of *penal* laws, and we see no reason why an English statute may not be held to have been applicable to our condition, when our adopting statute was passed, so far as rights are concerned, and inapplicable as to the harsh penal remedies given by it.

The learned Judge delivering the opinion in the case of *Dickinson et al. vs. Jones and Thornton*, 36 Ga., 97, seems to hold that the statute of Gloucester is of force in this State, without qualification. But this is *obiter*, as the only question before the Court was, whether the Court below erred in refusing to grant an injunction to stay waste, in the case made by the bill. And by reference to the report of the case, we find it distinctly stated that the complainants prayed an "injunction against the acts of waste aforesaid," *without restricting the proper use of the life-estate*. It is evident, therefore, that the question of *forfeiture* was not before the Court, and no adjudication was made on that point. Indeed, no forfeiture was claimed.

5. We are satisfied that the stringent rules of the English law relative to waste were not applicable to our condition, and were not adopted in this State. At the time our adopting statute was passed, the country was new; comparatively,

all part of our lands were in cultivation, the cleared
re everywhere surrounded by plenty of forest, and
as considered of but little value. In many cases it
sitive benefit to the inheritance for the tenant-for-
ar up, and put part of the wild land in cultivation.
ch would in England have been very injurious to
of the remainder-man, was in Georgia very benefi-
e one was an old country, with a very limited
of timber; the other was a new country, covered
ndless forests, where it was difficult to get labor to
land and prepare it for cultivation. In England,
g of the timber by the tenant-for-life worked irre-
njury. In Georgia, it may or may not have injured
of the remainder-man; and if it did, the damage
erally be compensated by going a little further to
r on the wild lands. Under these circumstances, it
nable to compel the tenant-for-life to pay the dam-
e by him to the inheritance, but unreasonable to
e life-estate with treble damages.

time the Code was adopted, our condition was ma-
hanged. A large proportion of the timbered land
ate had been cleared and cultivated, and timber was
re an object than it was at the date of our adopting

The result was the adoption of a new rule, that in
waste, the tenant-for-life shall forfeit his interest to the
r-man, if he elects to take immediate possession.

rule of the statute of Gloucester as to treble dam-
ot still adopted. Revised Code, 2229. This section
ode declares that the tenant-for-life is entitled to the
nd enjoyment of the property, so that, in such use,
ises the *ordinary care* of a *prudent* man for its pre-
and protection, and commits no acts tending to the
nt injury of the person entitled in remainder or re-

In determining what amounts to waste, regard must
o the condition of the premises, and the inquiry should
good husbandry, considered with reference to the cus-
the country, require the felling of the trees, and were

Dutcher vs. Justices Inferior Court of Fulton County.

the acts such as a judicious, prudent owner of the inheritance would have committed? 2 Greenl. Ev., 656; 10 Ga., 37 John., 232; 4 Dev. and Bat., 179; 7 Ala., 514.

Judgment reversed.

ISAAC V. N. DUTCHER, JR., plaintiff in error, vs. THE JUSTICES OF THE INFERIOR COURT OF FULTON COUNTY defendants in error.

A witness for the State, in a criminal case, who, in obedience to a *pœna* served upon him while temporarily in this State, actually came from his home, in a distant State, where he resided when the *subpœna* was served upon him, and testifies in the cause, is entitled to mileage from the county treasury, for the whole distance traveled in coming from and returning to his home.

Cost in criminal cases. Decided by Judge COLLIER. Chambers. Fulton county. December, 1867.

An indictment for larceny after trust, etc., was pending in the Fulton Superior Court. The record does not show whose property was stolen. During April Term, 1867, said Dutcher, who resided in St. Louis, Missouri, being in the court-room, was subpœnaed in said case, on behalf of the State. Upon the *subpœna*, he attended court till it adjourned, and the Solicitor General permitted him then to go home, with requiring a bond to return, upon his promise that he would return, in obedience to said *subpœna*. He did return, attend the Court, was sworn, and gave his testimony in the case. He proved his *subpœna*, claiming twenty-one days, at \$1 *per diem*, and in coming and returning, twenty-two hundred and fifty miles, at \$2 00 for each thirty miles. He asked the Judge to approve said account, so as to authorize the county treasurer to pay it. The Judge allowed the *per diem* and the mileage for three hundred and seventy-five miles traveled in this State, but refused to allow mileage for travel beyond this State. This refusal is assigned as error.

LOGE & SPRAYBERRY, (by the Reporter,) for plaintiff in error.

H. HULSEY, Solicitor General, for defendants in error.

MCCAY, J.

Section 3792 of the Code is in these words:

Witnesses for the State, in a criminal prosecution in the Inferior Courts, attending in a different county from that of residence, shall receive \$2 00 per day during their attendance, and \$2 00 for each thirty miles traveled in going and returning, which shall be paid," etc.

Judge Collier held, in this case, that the law would permit payment of mileage, to and from the State line, but not further. We see no reason for the restriction. The spirit of the law is certainly in favor of the payment from his residence, wherever that may be.

As a matter of public policy, it is important that witnesses should be encouraged to appear, and there is nothing in the law expressly confining it to persons resident in the State. They have a public duty to perform, but a citizen of another State owes no such obligation. He happens here, and whilst he becomes a witness to a violation of our laws. He is detained whilst here. If permitted to leave, he is under obligation to return. If kept here by force, which, perhaps the State might do, it would certainly be at her expense. It is a better policy, and there is nothing in the law to the contrary, is to pay him for coming and going.

A gentleman, as it appears, has, in good faith, made a journey, perhaps much to his own inconvenience, for the benefit of the county of Fulton, and as the spirit and reason of the statute, not to say its express words, gave him mileage, I think it was error not to have allowed it. The judgment reversed.

Blalock *et al.*, vs. Phillips.

JESSE L. BLALOCK *et al.*, plaintiffs in error, vs. JOHN PHILLIPS, defendant in error.

Plaintiff, in the Court below, sold to defendants four bales of cotton, while Confederate money was the currency, and had a market value, and was to receive that currency in payment. Defendants delayed payment till after the Confederate armies had surrendered, when one of them, with knowledge of the surrender, visited the plaintiff at his residence in the country, and paid the debt in Confederate currency, at a time when plaintiff swears he had no knowledge of the surrender.

1. *Held*, That in such case, it is a question proper for the jury to determine, whether defendant practiced a fraud upon plaintiff by taking advantage of his ignorance, and misleading him, and inducing him to receive the notes in payment, when defendant knew they were in fact of no value, by reason of the failure of the Confederacy.
2. If plaintiff was induced by fraud to take the notes, and they had ceased to have any market value, when he learned the fact of the surrender, he was not bound to tender them back to defendant to enable him to maintain an action for the amount due him for the cotton.
3. The plaintiff, in this case, waives the tort committed by the defendant in forcibly taking the cotton from his gin house, by the form of action brought; and can only proceed for the price of the cotton.
4. The conduct of certain jurors who, while they were charged with the case, conversed with a person not on the jury, in presence of a number of others about the case, and used expressions favorable to the right of the plaintiff to recover, assigning as a reason that defendant, sworn as a witness, had contradicted himself, when in fact he had not, is highly reprehensible, and a new trial should have been granted by the Court below on that account. Jurors should speak to no one, nor permit any one to speak to them about the case, while charged with its consideration.

Motion for new trial. Misconduct of Jury. Decided by Judge COLLIER. Fayette Superior Court. March Term, 1868.

Phillips brought an action against Blalock and John T. Hewell, as partners in cotton-buying. It was called, in the declaration and in the bill of exceptions, "an action on the case," but, in fact, it contained four counts, in each of which it was averred that Phillips had sold and delivered to said defendants, at their special instance and request, two thousand pounds of lint cotton; two of these counts were upon special promises to pay, in one \$30 per 100 lbs., and in the

r \$50 per 100 lbs., and the other two were upon prom-
to pay what the cotton was reasonably worth, the one
ng its value at \$30 per 100 lbs., and the other putting
\$50 per 100 lbs. The defendants plead that they pur-
said cotton from the plaintiff for Confederate currency,
ith it had paid him for it.

evidence was substantially this: All the parties were
and agreed, that on the 7th of March, 1865, plaintiff
the defendants four bales of cotton, weighing five hun-
pounds each, at one dollar per pound, to be paid in
lerate currency, and took their note for the \$2,000 00,
ng to keep the cotton in his gin-house, at defendants'
ill they called for it, and that plaintiff set it apart in
house for them; on the 3d of May, 1865, Blalock, *en*
o a justice's court, called on plaintiff, and paid him the
nd \$20 00 in said currency, as interest; that about the
July, 1865, Blalock called for the cotton; plaintiff re-
to deliver it, saying the currency was worthless when he
t, and that he would not deliver the cotton, but was
g to arbitrate the matter; that afterwards, on the 3d
gust, 1866, the defendants and others went to the gin-
of plaintiff, at night, armed, and by force, took the
and carried it away.

plaintiff swore that he called for payment of said note
l times, but, by reason of the absence of one or the
of the defendants, it was not paid, while the defendants
d that they could and would have paid him, but he
e only wished to know that the note would be cashed
mand, as he wished, with its proceeds, to purchase a
from one McIntosh, and they showed, by another, an
o pay, and that plaintiff said he did not then wish the
. Plaintiff also swore that, when he took the currency
Blalock, he knew nothing of the surrender of the Confed-
armies, nor learned it till, on the same day, he went to
with McIntosh, who gave him the information, and
d to receive the currency, but Blalock swore that when
id the note, he told plaintiff that Lincoln was dead, and
Lee had surrendered. The defendants both testified,

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that after plaintiff had shewn Blalock the cotton, and refused to deliver it to him, Hewell had bought out Blalock's interest, by giving him his note for \$360 00 in gold, which was subsequently paid off by part of the proceeds of the cotton when Hewell sold it, and that, while it was true Blalock was present when the cotton was forcibly taken from the house, he had no interest in the cotton. The reasons for going, given by Blalock, was, in one instance, because he wished to look after his wagon and team, which was hauling the cotton, and, in another, that he went because some of the boys who went along were drinking, and their parents would not allow them to go unless he went.

The value of cotton was shewn to range from twenty cents to forty-three cents per pound, during 1865. There was no evidence as to the value of Confederate currency except as aforesaid, and that, soon after the Federal army took Macon, Georgia, \$10 00, in gold, bought \$2,500 in such currency.

Defendants' attorneys requested the Court to charge the jury, that, if Blalock had sold out his interest in the cotton to Hewell before Hewell took it, Blalock was not liable in this form of action. The Court refused so to charge, but charged that, if, under the rules which he had laid down (what they were does not appear,) the title and possession had not passed to the defendants, and the defendant, Blalock, aided or assisted, in any way, in taking the cotton, then he was liable in this form of action; but if the title and possession had passed, or the defendant, Blalock, did not aid or assist in taking the cotton, then he was not liable.

The plaintiff had a verdict for \$820 97. Thereupon the defendants' attorneys moved for a new trial, upon the ground that the verdict was contrary to the law and evidence, and that the Court erred in not charging as requested, and in charging as he did, and because of misconduct of several of the jurors.

It was shewn, by the affidavit of several persons, taken during said trial, Isaac Hastie and James Lynch, two of the jury, said, in the presence of persons at table with them, that

They had heard the testimony of said defendants, that they both first swore that the cotton belonged to Blalock, and then swore it was not his, and that, according to that testimony, they did not see how they could do otherwise than find for plaintiff; that the currency was worthless when paid, it being after the surrender of Johnson's army, and that plaintiff should be paid for his cotton.

It was shewn by another affidavit that, during said trial, H. Smith and James Lynch, two of the jurors, spoke to Wright Martin concerning said cause, Smith saying it was "a dead case," and Lynch saying "it was a worse case than the Field's land case," (which had just been tried,) and Smith asked Martin what he thought of the case. The affiants stated in their affidavits that they did not communicate these things to the defendants or their attorneys till after the verdict, and Blalock, and Q. C. Grice, his attorney, affirmed that they knew nothing of said facts till after said verdict.

In reply, the plaintiff's attorney submitted the affidavit of said Hastie and Lynch, in which it was stated that, at said table, the landlady asked what had been done in said cause, when Lynch replied that it was not yet decided, that they had not yet gotten through with the evidence; that the lady said plaintiff was an hard working old man, and should be paid for his cotton; to which Lynch replied, that plaintiff seemed to be a smooth, nice old man, and he hoped justice would be done; and further, that the only thing he said to Wright Martin was, (while he was sending word by his servant why he could not go home,) that the cause was a more tedious one than the other, alluding to the length of the argument, etc. Hastie said that he replied to said landlady that he thought plaintiff would get pay for the cotton, unless the evidence on the other side was strengthened, as one of the parties had contradicted his own evidence. They both affirmed that this was all they said; that they did this inadvertently in reply to said landlady, not knowing it was wrong, and that it had nothing to do with their finding, which was honestly made up from the evidence. There was also an

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affidavit by three citizens that said Hastie and Lynch were honest, intelligent and firm men.

The Court refused the new trial, and of this complaint here made, the assignments of error being the same as the grounds for new trial.

GRICE, PEEPLES and STEWART, for plaintiffs in error.

TIDWELL and FEARS, for defendant in error.

BROWN, C. J.

It appears from the evidence in this case, that the cotton was not paid for as originally contemplated at the time of the sale, and that Phillips extended indulgence to the defendant below, and the Confederate notes were not in fact paid till after the surrender of the Confederate armies. The evidence is in conflict as to Phillips's knowledge of that fact, when he received the notes. He swears positively that he had no such knowledge, while Blalock swears that he informed him of General Lee's surrender at the time.

It was for the jury to reconcile this conflict if possible, and if not, to consider the credibility of the witnesses, their means of knowing the facts about which they testified, etc., and determine who was most entitled to credit.

1. If Phillips received the Confederate notes in payment for the cotton, with knowledge of all the facts, and the trade was fairly consummated, it is not the business of the Court and jury to undo what has been done. But if Blalock, who had not complied with the original terms of the contract, and had received indulgence, after he learned that the Confederate armies had surrendered, and that Confederate treasury notes were worthless, went to the residence of Phillips, in the country, and concealed the facts from him, and by false statements, or other fraudulent means, induced Phillips to receive the money in payment, he was guilty of fraud, and cannot insist upon the receipt of the Confederate notes by Phillips as payment.

2. But it is insisted that Phillips, having received the

mediate notes, was bound to tender them back to Blalock so that he could maintain an action for the price of the cotton. The notes were worthless when received by Phillips, or so worthless, that they became worthless before he obtained knowledge of the surrender, and had an opportunity to tender them back, the tender was not necessary. We understand it to be, that a contract cannot be rescinded, without a return of the chattel, or currency, received, unless it is valueless to both parties. But if it is valueless, it need not be returned. 3 McL. C. C., 386. Hemp., 710. Cr. C. C., 427. It was contended further, that plaintiff should have maintained his action of trespass *vi et armis* for damages, as the cotton was forcibly taken from his gin house at night, by the defendants and others. Possibly, he could have maintained his action. But he had a right to waive the tort, and sue on the contract, express or implied. Having done so, he cannot recover damages for the tort, but is confined to his action on the contract, and cannot recover damages beyond the value of the cotton, with interest. Revised Code, 2894.

The only remaining point requiring attention is the conduct of certain jurors, which, we think, is highly reprehensible, and on that account a new trial should have been granted. It appears from the evidence that two of the jurors, while charged with the consideration of the case, not only conversed with persons, not jurors, about the case, but discussed its merits, and commented upon the verdict in presence of a number of persons at the table, and contradicted it, by saying that the defendant, sworn as a witness, contradicted himself, etc. A juror, while the case is on, should neither speak to any one, nor permit any one to speak to him about it. For the gross violation of this rule in this case, the Court should not only have set aside the verdict, but he should have inflicted exemplary punishment upon the delinquent jurors.

Judgement reversed.

Thomas vs. The Georgia Railroad and Banking Company.

GEORGE M. THOMAS, plaintiff in error, vs. THE GEORGIA RAILROAD AND BANKING COMPANY, defendant in error.

1. An appeal should not be dismissed because of the insufficiency of the security, until the appellant has been required to give other security, or shew cause why the appeal should not be dismissed.
2. By the provisions of the 3329th section of the Code, railroad companies are liable to be sued for injuries done to persons, or property, by the running of "hand-cars" upon their roads, as well as by the running of cars propelled by steam-power, and may be sued therefor, in any county in which the cause of action originated.

Dismissal of appeal. Jurisdiction. By Judge POPE. DeKalb Superior Court. October Term, 1868.

Thomas brought case, in DeKalb county, against said company, for breaking his arm by the careless running of one of their hand-cars, by his fellow servants, in said county. It was not averred where the residence of the company was, except as follows: "The Georgia Railroad and Banking Company, a corporation of said State, having a portion of its road in, and doing business in, said county of DeKalb," and that the injury to the plaintiff was done upon their road in said county.

The defendant plead the general issue. There was a trial before the *petit* jury against the defendant, from which defendant appealed. The appeal bond was made during the term of the Court, and was in regular form, except that the Clerk had failed to sign his name under the words "tested and approved." The security on the bond was John N. Pate.

When the cause was called for trial, plaintiff's attorney moved to dismiss said appeal, because said bond had not been approved by the Clerk, and because the security on the bond was insolvent. In support of this motion, they proposed to show the want of approval, as aforesaid, from the minutes, and to prove by the Clerk that he failed to approve the bond, because of the insufficiency of the security, it having been objected to by plaintiff's attorneys within the four days from the adjournment of the Court allowed for appealing, and notice of this objection having been given to the agent of the company at

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Deatur, DeKalb county, Georgia, within said four days. They proposed to shew the insolvency of said security. The Court refused to dismiss the appeal.

The defendant's attorneys then moved to dismiss said cause on the ground that the cause of action set forth in the declaration, (injury by a hand-car,) did not give jurisdiction to DeKalb county. The Court dismissed the case. His refusal to dismiss the appeal, and his dismissal of the case, are assigned as error.

HILL and CANDLER for plaintiff in error.

L. J. GLENN & SON for defendant in error.

WARNER, J.

1. There are two grounds of error assigned to the judgment of the Court below in this record. First, in refusing to dismiss the appeal; second, in dismissing the plaintiff's action for want of jurisdiction. In our judgment, there was no error in refusing to dismiss the appeal, upon the statement of facts presented. When a motion is made to dismiss an appeal at the first term after an appeal has been entered, on the ground of the insufficiency of the security, a rule should be applied for, requiring the party to give *other security*, or to shew cause why the appeal should not be dismissed, of which the party should have reasonable notice, as it is his privilege to give other and better security, if he shall be required to do so. 2. In our judgment, the Court below erred in dismissing the plaintiff's action for want of jurisdiction in DeKalb county, in which the suit was pending. By the 3320th section of the Code, it is declared that "All railroad companies shall be liable to be sued in *any county* in which *the cause of action originated*, by any one whose *person* or property has been injured by such railroad company, their officers, agents, or employees, in or by the running of the cars, or engines, for the purpose of recovering damages for such injury." The plaintiff alleges that he was injured in his *person*, by the defendant, upon his road, in the county of

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Dekalb, by the running of a "*hand-car*." It was contended on the argument, that the "cars" contemplated by the Code meant such cars only as were propelled by steam power, and not "*hand-cars*." The reply is, that the Code makes no such distinction, and the Courts have no authority to do so. The words of the Code are general, and embrace *all cars* which are run upon the road by the defendant. Besides, it is not very apparent to this Court, why an injury may not be done to the person, and property, of individuals by the *careless* and *negligent* running of "*hand-cars*" by the defendant, upon the road, as well as by the running of other cars propelled by steam. The question of injury may be one of *degree* only; but either may be the instrument of injury, when carelessly or negligently managed by the servants and agents of the company. Let the judgment of the Court below be reversed.

JOHN W. ODELL, plaintiff in error, vs. JOSEPH WOOTTEN, defendant in error.

1. Security on an appeal bond, under our Code, only binds himself for the payment of the debt or damages for which *judgment may be entered* in the cause, and if no judgment is ever entered against the principal in the cause, no liability attaches to the security.
2. As Congress has the power, under the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, and as the Act of Congress forbids the prosecution of an action against a person adjudged a bankrupt, until the question of his discharge has been determined, and relieves him, when discharged, from all debts and liabilities, etc., which might have been proved against his estate, a security on the appeal in this State is no longer liable, when the principal is discharged in bankruptcy: which discharge of the principal terminates the case pending in the State Court against him, and prevents any judgment. The security on the appeal does not contract to pay the debt, but the judgment that may be entered in the suit then pending.

Bankruptcy. Security on appeal. Decided by Judge PARROTT. Fulton Superior Court. October Term, 1868.

Odell sued Wootten, and had judgment. Wootten appealed to the Superior Court, giving security, and there pleaded on the 19th day of May, 1868, he had been duly adjudged a bankrupt, (vouching the record of the discharge,) and was thereby discharged from said demand. Plaintiff's attorneys demurred to said plea, contending that, though Wootten was so discharged, they had a right to proceed to judgment against the security on the appeal.

The Court overruled the demurrer, and ordered the case affirmed at plaintiff's costs. This is assigned as error.

AMMOND, MYNATT & WELBORN, for plaintiff in error.

WILLIAMS & CANDLER for defendant in error.

JOHN, C. J.

The defendant in this case became security on an appeal, executed for the purpose of taking an appeal from the judgment of the County-Court to the Superior Court, as provided by law, prior to the adoption of our new Constitution, under which such an appeal is no longer allowed. The effect of such an appeal was to bring up the whole case for a new trial before a special jury.

After this appeal was entered, the principal in the Court below, who had entered the appeal, was adjudged a bankrupt, and was fully discharged as such in the proper Court. And the question presented for our adjudication is, did this discharge of the principal, discharge the security on the appeal? We think it did.

1. The Revised Code, section 3559, provides, that the appellant, before entering such appeal, shall pay all costs which may have accrued, and give bond and security for the eventual condemnation money.

Section 3564 declares, that such security shall be bound for the judgment on the appeal, and that he may be compelled to pay off the debt or damages for which judgment may be rendered. This is the extent of his liability. He does not contract to pay the debt or damages absolutely, but only the

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debt or damages for which "judgment may be entered" on the trial of the appeal. To illustrate: Suppose A sues B in an action of assumpsit on a promissory note under seal, and the *petit* jury renders a verdict in his favor, and B enters an appeal to a special jury, and C signs the appeal bond as security, on the statute terms it: After the appeal, A finds that he can not maintain his action of assumpsit on the sealed instrument, and he dismisses it, and afterwards begins an action of debt against B for the recovery of the same amount, due on the same promissory note under seal: will it be contended that C, the security on the appeal in the first action, which has been dismissed, is liable for the judgment that may be entered against B in the second action? Certainly not.

B did not become a surety for the payment of the debt, he only contracted to pay the judgment that might be entered in the action then pending; and when that case went out of Court, the liability went with it. In other words, as no judgment was rendered against his principal, no liability attached to him.

2. But it is insisted by counsel for plaintiff in error, that the act of Congress known as the Bankrupt Act, section 33, is the paramount law on this subject, and that it enacts, that the discharge of the principal, as a bankrupt, shall not discharge the security. A careful perusal of the Act will show that this applies only to a surety who contracted to become liable for the payment of the *debt*, and not for the payment of the *judgment* to be entered in a particular action then pending. Its language is, "no discharge granted under this Act, shall release, discharge or affect, any person *liable* for the *same debt*, for or with the bankrupt, either as partuer, joint contractor, indorser, security or otherwise." This clearly contemplates a case where the security contracts to become liable with the principal for the payment of the debt.

This same Act, (section 21,) which, under the Constitution of the United States, is, we admit, the paramount law on this subject, declares that no creditor, whose debt is provable under this Act, shall be *allowed to prosecute* any suit at law or in equity, to *final judgment*, against the debtor, after he is

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adjudged a bankrupt, until the question of his discharge has been determined.

Again, it is declared, in section 54, that the discharge duly granted under this Act shall, with the exceptions aforesaid, (which do not apply in this case,) release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy.

Wooten's contract, when he signed the appeal bond, was to pay the judgment that might be entered in that case. His principal was afterwards adjudged a bankrupt, and discharged as such. And the paramount law says, as the claim was provable in bankruptcy, that the principal shall be absolutely released from the debt, and that no judgment shall ever be entered in the case. Upon this state of facts, we hold that Wooten, the security on the appeal, has complied with his contract, and his liability ceases.

Judgment affirmed.

HARPER & AMMONS, plaintiffs in error, vs. A. A. LEMON, executor, etc., defendant in error.

(Held up because of military order.)

When a father authorized a merchant to let his daughter, who was a minor, have whatever she wanted out of his store, and the merchant permitted her to purchase various articles, such as were usually kept for sale by the merchant, the father is liable for the goods purchased, though they be neither necessities nor such goods only as a prudent father would furnish a minor child.

Assumpsit. Motion for new trial. Decided by Judge SPEER. Henry Superior Court. October Term, 1867.

Rhoderick T. Harper & Wm. B. Ammons, merchants and partners, under the style of Harper & Ammons, brought *assumpsit* against Alexander Lemon, upon an open account for goods sold and delivered to his daughter, between the 1st

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of March, 1860, and 8th of October, 1861, amounting to \$583 45. One count averred that they were furnished to her as necessaries, and another that they were furnished by special request of her father. The account was as long as the moral law, and embraced almost everything which a school-girl with *carte blanche* would buy. She very frequently bought snuff, indulged pretty freely in candy, and the like, bought quite a number of cheap gold rings, etc. In the account were three or four items, amounting, in the aggregate, to about \$10 00, stated to be "per order," and six items for cash loaned and cash paid for her, amounting, in the aggregate, to \$6 95.

Alexander Lemon died, and Abel Lemon, his executor, was made defendant.

Upon the trial, the plaintiff relied only on the second count. WADE HARPER, being on the witness-stand, proved the plaintiffs' books of original entry; that the account sued on was in the hand-writing of Julius Askew, deceased; that before that, he had testified in this cause, that he copied the account; that he posted the books, but did not sell the articles; he had compared the day-book with the account sued on; those marked, in the account, he sold and delivered to the said daughter; the others were in the hand-writing of his brother, one of the plaintiffs, except one, which was in the hand-writing of Askew. (What he had marked does not appear.) The charges for the goods, he said, were reasonable, and her father had said, in the Spring or Summer of 1860, to him, to sell her any goods she wanted. He said he only knew the items and prices from the books. He was the clerk of plaintiffs from January, 1860, to July, 1861. The daughter was a school-girl, sixteen or seventeen years old. The cash items were advanced by him. He thought that some of the items were not gotten by the daughter, but upon orders, sent by negroes, by Alexander Lemon.

ALLEN TURNER testified that, in the Spring of 1860, he and Alexander Lemon were in plaintiffs' store, leaning on a pile of blankets, and he spoke to him about his daughter trading with plaintiffs, and Lemon told him that he had told

Thomas Harper, one of the plaintiffs, to let his daughter have anything she wanted. The girl had married before this trial, and testified that she bought the goods, that sometimes her father gave her permission to buy, and sometimes she did not ask him, that he gave her money when she asked him for it, and sometimes directed her to go to the store and get on a credit what she wanted. The plaintiffs proved that they kept correct books, introduced the books, and closed.

On the part of defendant, a witness testified that he saw Alexander Lemon meet Harper, in the corner store, and say to Harper that he had frequently told him not to sell his daughter goods, as she was not a judge of goods. Harper said he would take it back, it was a small bundle, and he did take it back; he did not know when it was, but it was after 1856, and he thought about the beginning of the war; he did not know where Harper was doing business then. It was shewn that in 1860 and 1861 plaintiffs did not do business in the corner store.

There was other testimony as to Alexander Lemon's pecuniary ability, showing that he was worth from \$20,000 00 to \$30,000 00, and as to his habit of furnishing his family proper supplies, etc., but, as the first count in the declaration was abandoned on the trial, it is not material here.

The Court charged the jury that they must first be satisfied, from the evidence, that the items in the account were correct before they need inquire as to Alexander Lemon's liability. He told them, if the account was correct as to items and values, that this promise to pay need not be in writing, because, if Alexander Lemon was liable, it was by reason of his making his daughter his agent to purchase the goods; that if the father fails to supply necessities, his daughter may buy them, and the law will imply a contract by him to pay for them, but by express agreement, the authority from the father may be greatly enlarged, and if Alexander Lemon authorized plaintiffs, or either of them, or their clerk, to let his daughter have from their store whatever she wanted, he made her his agent to contract and he is bound by her acts, though they may exceed what is actually necessary for her comfort, and if

4th. In refusing a non-suit because it was not shewn that ~~mid~~ goods were necessities, and that the minor's father did ~~apply~~ her. (No non-suit appears to have been moved for.)

5th. Because plaintiffs had proved no promise to answer for this debt binding on defendant.

6th. Because of the vagueness and uncertainty of the amount for which defendant was liable, if at all.

7th. Because the charge is contrary to law, and without law to support it.

8th. Because the Court failed to charge that the conduct of silent admission in reference to the liability of the defendant, or failure to assert the authority of plaintiffs to sell the goods to defendant's daughter, when such authority was questioned, and the effect of such conduct and failure of denial as evidence that the jury might consider in determining the truth of said authority, defendant's attorney having called the attention of the Court to the same in his argument to the jury.

And 9th. The verdict was contrary to law, the charge of the Court, the evidence, and the weight of evidence.

The Court granted a new trial, upon the ground that his charge was wrong, he believing that an authority to let her have whatever she wanted, did not authorize plaintiffs to let the daughter have things extravagant or unreasonable.

JNO. J. FLOYD, G. M. NOLAN, for plaintiffs in error.

W. W. CLARK for defendant in error.

McCAY, J.

The motion for a new trial was granted in the Court below, on the ground that the Court had erred in its charge to the jury in this: "That if Lemon authorized plaintiff, or his clerks, to let his daughter have from their store whatever she wanted, he made her his agent to contract, and he is bound by her acts, though she exceed what is actually necessary for her comfort."

We think this charge, under the facts of this case, was

Thomas vs. The Georgia Railroad and Banking Company.

GEORGE M. THOMAS, plaintiff in error, vs. THE GEORGIA RAILROAD AND BANKING COMPANY, defendant in error.

1. An appeal should not be dismissed because of the insufficiency of the security, until the appellant has been required to give other security, or shew cause why the appeal should not be dismissed.
2. By the provisions of the 8329th section of the Code, railroad companies are liable to be sued for injuries done to persons, or property, by the running of "hand-cars" upon their roads, as well as by the running of cars propelled by steam-power, and may be sued therefor, in any county in which the cause of action originated.

Dismissal of appeal. Jurisdiction. By Judge POPE. DeKalb Superior Court. October Term, 1868.

Thomas brought case, in DeKalb county, against said company, for breaking his arm by the careless running of one of their hand-cars, by his fellow servants, in said county. It was not averred where the residence of the company was, except as follows: "The Georgia Railroad and Banking Company, a corporation of said State, having a portion of its road in, and doing business in, said county of DeKalb," and that the injury to the plaintiff was done upon their road in said county.

The defendant plead the general issue. There was a trial before the *petit* jury against the defendant, from which defendant appealed. The appeal bond was made during the term of the Court, and was in regular form, except that the Clerk had failed to sign his name under the words "tested and approved." The security on the bond was John N. Pate.

When the cause was called for trial, plaintiff's attorney moved to dismiss said appeal, because said bond had not been approved by the Clerk, and because the security on the bond was insolvent. In support of this motion, they proposed to show the want of approval, as aforesaid, from the minutes, and to prove by the Clerk that he failed to approve the bond, because of the insufficiency of the security, it having been objected to by plaintiff's attorneys within the four days from the adjournment of the Court allowed for appealing, and notice of this objection having been given to the agent of the company at

Henderson vs. Merritt.

abt. Motion for new trial. Decided by Judge SPEER.
ry Superior Court. October Term, 1867.

Merritt filed, in the County-Court, a petition to establish
n notes, which he claimed were executed by John W.
ford and John W. Henderson, payable to himself, and
he had lost. Henderson appeared, September, 1866,
defended, pleading that if such notes were ever in exist-
they were paid, and that he never signed nor made the
d notes, nor authorized any one to do so for him.

Jury found for the plaintiff, and a rule absolute was
establishing the copy-notes, in lieu of the lost originals.
sued Henderson upon said established copies, in the
-Court. What was the evidence, and what was the
ere, did not appear by the record. In August, 1867,
as a verdict for the defendant. From that, the plain-
ealed. When the cause came on for trial, plaintiff's
y proposed to strike defendant's plea, which was *non*
est factum, upon the ground that the same had been filed and
upon in the County-Court, on the motion to establish
notes. Thereupon, defendant's attorney proposed to
bat, after the hearing of the motion to establish said
he plea of *non est factum* being there filed and heard,
rney for Merritt agreed with him that if he would
out a *certiorari* to set aside the said rule absolute, he,
's attorney, would take no exceptions, but defendant
make his defence, when sued on the established notes,
ame manner, and to as full an extent as if no issue
r been had or tried upon the motion to establish said
d that, relying on this promise, he, defendant's attor-
not sue out *certiorari*: which evidence, thus offered,
cted by the Court. The Court struck the plea, and
as a verdict for the plaintiff.

defendant moved for a new trial, upon the ground that
rt erred in ruling out the evidence offered by defend-
in striking said plea. He refused a new trial, and
assigned as error. (At June Term, 1867, of this

Henderson vs. Merritt.

Court, this cause was under the military order, and therefore, held up.)

M. ARNOLD, PEEPLES & STEWART, for plaintiff in error.

G. N. NOLAN, (by J. J. FLOYD and the Reporter,) defendant in error.

WARNER, J.

The error assigned in this case to the judgment of the Court below, is in rejecting the evidence offered by the defendant to prove the agreement set forth in the record in consideration that he would not *certiorari* the case decide the County-Court, and in striking out the defendant's plea of *non est factum*. This was not such a consent between attorneys and parties as is contemplated by the rule of Court requiring such consent to be given in writing; or rather it does not come within the *reason* and *spirit* of that rule. It was not a consent to waive evidence or pleading. It was a *contract*, executed by one party, by which he declined to *certiorari*, in consideration that he should be allowed to file his plea of *non est factum* when suit should be instituted on the notes. The forbearance to sue out the *certiorari* from the decision of the County-Court, was a sufficient consideration to support the contract, and the plaintiff, having had the benefit of the contract, it was a *fraud* upon the defendant not to execute it in good faith on his part. The rule of Court was intended to *prevent* surprise and fraud, not to sanction or protect *fraud*. Good faith and fair dealing require that the plaintiff should perform his part of the contract, especially as he has had the benefit of it. From the facts presented on the record, we think the Court below erred in ruling out the evidence offered to prove the contract between the parties and in striking out the defendant's plea.

Let the judgment of the Court below be reversed.

THOMAS MCKIBBON, plaintiff in error, vs. **ELIZABETH A. FOLDS**, defendant in error.

1. Where one who holds land adversely to the widow's right of dower, but who was not notified of the application, comes in, at the return term of the commission, and contests the return, he can not object to the order of the Court appointing the commissioners, on the ground that one of them was not a free-holder.
2. When, in an issue on the return of commissioners to lay-off dower, the applicant opened the case by proof to sustain the return, and the contestant replied with proof attacking it, it is too late for the contestant to claim that he has a right to open and conclude the argument before the jury.
3. In an issue on the return of commissioners to assign dower, it is error for the Court to charge the jury, that in estimating the value of the land, (other than the dwelling-house and curtilage,) they ought not to consider improvements, such as log dwellings, etc., "unless these improvements are of considerable value, such as a two-story house, etc."

Dower. Charge of the Court. By Judge GREEN. Butts Superior Court. September Term, 1868.

Elizabeth A. Folds applied for assignment of dower out of the lands of her deceased husband. Commissioners were appointed, and assigned her forty-seven acres of said lands. She traversed their return, and had it set aside, and another set of commissioners were appointed by the Court to make said assignment.

In 1857, said husband had mortgaged his land to Thomas McKibbon. In 1867, a rule absolute was granted, foreclosing said mortgage. A *fi. fa.* issued, and under it, said land was sold by the sheriff, and bought by the mortgagee, in December, 1867. The sale was made, subject to the widow's dower, and the deed conveyed the whole, "the widow's dower excepted." It was stated, at the sale, that she would traverse the assignment already made. McKibbon was put into possession.

At September Term, 1868, said last named commissioners made their return, and Mrs. Folds's attorneys sought to make it the judgment of the Court. Thereupon, said McKibbon, by permission of the Court, was made a party,

McKibbon vs. Folds.

and traversed said last return, upon the following grounds:

1st. There is a return of former commissioners, which has never been legally set aside, the same being done with notice to the parties in interest, and upon insufficient grounds and without the intervention of a jury.

2nd. No legally qualified commissioners were ever appointed by said Court, in pursuance of the statute in this case made and provided, for the admeasurement and assignment of said dower, three of said commissioners not being free-holders.

3rd. Said commissioners were never sworn to the performance of said duty, as required by law.

4th. Said admeasurement and assignment were illegal, made in this, that the portion of the land assigned to said widow, exceeded in valuation one-third of the value then embraced by three settlements, consisting of houses and tenements, and none of which were valued, and they had no respect to the shape or valuation of the lands out of which said dower was laid off and admeasured.

Mrs. Folds's attorneys demurred, and moved to strike out said second ground. The Court ordered it stricken. McKibbon's attorneys then insisted that they had the right to open and conclude, both with the evidence and the assignment, but the Court decided otherwise, and ordered the attorneys of Mrs. Folds to proceed. Testimony was then introduced by the parties. It was shown that the formalities of the statute had been complied with. The fight was now upon the fitness of this new assignment, as to quantity, value and location. It appeared that the whole premises contained two hundred and thirty-seven and a half acres, and that to them, these new commissioners assigned to her, as dower, seventy-four acres. The commissioners and others testified that they had carefully examined the land, gave a description of it, and said they thought their assignment was a fair one-third of the premises, according to valuation, etc. It was stated that, in fixing values, they did not put any value upon the "settlements" outside of the curtilage. It appeared that the land was about one hundred and fifty yards from the mansion-house.

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in house occupied by John J. Folds, step-son of , and that there was another cabin which had been (since the dower was laid off,) out of the yard of the house, and about fifty yards from it, but still on the dower.

In the part of McKibbon, many witnesses were examined, and as to the value of said dower land, as compared with what was left to McKibbon, all agreeing that the dower was a small part of the value of the whole tract, exclusive of the house and appurtenances, one of them saying that the dower was left to McKibbon was good for nothing, "to hold the earth together." They testified that the dower part was compact, and on the middle of the lot; McKibbon's was in two parcels, separated by hers and the river, etc. Of those "settlements," it was said, one was a tolerably comfortable log cabin, worth \$40 00 or \$50 00 and the other was a tolerably comfortable log dwelling-house and stables, and worth, at a low estimate, \$50 00 or \$100 00. One witness thought the dower was independent of improvements, worth \$100 00 more than the two-thirds left to McKibbon. These witnesses gave their valuation of the lands and the improvements, and testified that the dower was too much, and improperly

The dower son's attorneys asked the Court to charge the jury, that it was the duty of the commissioners, in setting apart the dower, to take into consideration the improvements on the land outside of the residence occupied by the widow, and if they did not do so, their return ought to be set aside. The Court refused to charge as requested, but charged, that it was the duty of the commissioners to take into consideration the important improvements, such as a good two-story house or other such good building, outside of the home-lot; that they had no right to take into consideration the improvements, connected with the house and residence only; that it was not expected that they should give mathematical certainty, and that any small difference in value would not avoid the return; that in consider-

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ing improvements, he did not think it was the duty of commissioners to estimate the value of any little improvement in the way of small-log cabins or shanties, an hundred fifty yards, or such a matter, from the residence of Folds. He then stated the legal rules for assigning dower and charged that, if the assignment was not so made, fair and equitable, it should be set aside.

They also requested him to charge, that the statute requiring the appointment of five free-holders, to admeasure, lay and assign dower, and that the appointees of the Court being free-holders, at least as to three of them, said request was unauthorized by law, and should be declared void, set aside. The Court refused so to charge. The verdict in favor of the return of the commissioners. McKibbon sued out his bill of exceptions, assigning as error the stating of the second ground of his traverse, the refusal to allow his attorneys to open and conclude in the cause, the refusal to charge as requested, and the charge as given.

LYONS, PEEPLES & STEWART, for plaintiff in error, cited on their 1st point, sec. 3969 of the Code; on their 2d, sec. 3969 of the Code; and as to the charge, secs. 1753, 3664 of Code. *Keller vs. Dillon*, 26 Ga. R., 701; *Glass et al. vs. Cook*, 30 Ga., 133.

L. T. DOYALL for defendant in error.

McCAY, J.

1st. McKibbon, if he is made a party to this proceeding on his own motion, must take the case as he finds it. He cannot take no exceptions, not good in the mouth of the defendant to whose care he has attached himself. If there was a good objection to one of these commissioners, it ought to have been made at the time of the appointment. The then defendant failed to object. It is, therefore, waived, and McKibbon, coming in now, is bound by that waiver.

2d. There is some confusion in the cases, on who has the right to open and conclude, in questions of this character.

current of our decisions is, that it belongs to the party instituting the proceedings, and having power to open and conclude them. *Weeks and wife vs. Seago*, 9 Ga., 199; *Harrell vs. Young*, 9 Ga., 359; *Dickerson vs. Croom*, 24 Ga., 268. The case of *Johnson vs. Martin*, 25 Ga., 268, at first sight, would seem to conflict with these cases. There, however, the Court puts its decision on the ground that it was merely an issue of *fraud*, and as, in such a case, the burden of proof *must* be on the party charging the fraud, he has the right to open and conclude.

In the case before us, though the only question was in relation to the report, yet, in such issues generally, the fact of ownership, the seizin, and other questions might arise, and the inclinations are, to hold that the applicant for dower has the affirmative, and must open and conclude. It was, at any rate, after the plaintiff had gone on, and a verdict had taken place, to make the question. Whoever opens the case, with the evidence, if he has a right so to open, has the right to conclude in the argument.

The statute is express, that (except as to the dwelling, which includes what is necessary to its enjoyment,) the dower to be laid off, having respect to shape and valuation. Code, § 3969. See, also, section 1753 Irwin's Code. We think the jury ought to set aside the return because of a trifling excess of value on one side or the other. But it is their duty to consider the value of the lands set off, as they are, and that left, and *any* thing, which adds to that value, or detracts from it, for consideration.

We hold, therefore, that the Court erred in instructing the jury that they were not to *consider* a log-house or other outbuilding. That is true, if it has no value, but they must consider the value of the whole, including every thing which adds to, or lessens, that value.

Verdict reversed.

Battle vs. Battle and Heath.

CURRAN BATTLE, plaintiff in error, vs. L. N. B. BATTLE and RICHARD A. HEATH, sheriff, defendants in error.

There is nothing in any law of this State or in any order of the military commander, while the State was under military government, which authorizes the Court to pay money raised at sheriff's sale, on the first Tuesday in January, 1868, to the defendant in *fi. fa.*, while there are judgment creditors claiming it.

Rule against the Sheriff. Decided by Judge WM. M. REESE. Warren Superior Court. April Term, 1868.

Curran Battle was defendant in several *fi. fas.* issuing out of said Court. Under one of them, his property was sold on the first Tuesday in January, 1868. At the April Term, 1868, the sheriff was ruled, and the different plaintiffs in *fi. fa.* were at issue, as to which of them should take the proceeds of the sale.

Battle then came in, and objected to any one of them taking the fund, and asked that it be paid to himself. His ground for this was, as he averred, that the seventeenth section of the fifth article of the Constitution of Georgia, made in 1868, forbade the enforcement of judgments founded upon contracts made prior to June, 1865, which section had been put into active operation, on the 12th day of March, 1868, by order No. 37, issued by Major General George G. Meade, commanding the 3d military district, embracing this State. All of the judgments claiming the money, and that under which the sale was made, were prior to June, 1865. The Court ordered the money paid over to the judgments till they were satisfied, holding that the distribution of funds in Court, was not affected by said order, and that this case was within the first exception in the section of said Constitution denying jurisdiction, etc.

This ruling of the Court is assigned as error.

A. R. WRIGHT, (by the Reporter,) for plaintiff in error.

R. TOOMBS, for defendant in error.

 Williams *et al.*, vs- Mobley, ex'r.

BROWN, C. J.

We are not aware that the Judge who decided this case violated any provision of the Constitution or laws of this State, in ordering the fund then in Court, which the sheriff had raised by the sale of the property of the defendant, under legal executions, to be paid over to the plaintiffs *fi. fa.*, according to their legal priorities, until their judgments were satisfied, before any part of it was paid to the defendant in *fa.*

It is said, this judgment violated the order of Major General Meade, who was the commander of the third military district, embracing this State, as the sale took place while the State was under military government. No order of General Meade has been brought to our attention, which requires the Courts to pay money, raised as this was, to the defendant *fi. fa.*, while there were judgment creditors unsatisfied.

Judgment affirmed.

JOHN T. WILLIAMS *et al.*, plaintiff in error, vs. JAMES M. MOBLEY, executor of Brittain Williams, deceased, defendant in error.

The minor legatees under a will, who are not the children of the testator, have no right, in a case pending in Chancery, upon a bill filed by the executor, for direction, to an interlocutory order, setting apart money for their support, unless the estate is solvent, and able to pay all just debts, and leave a sufficient fund, out of which to pay the sum necessary for their support. And it was error in the Chancellor to grant said order, when the solvency of the estate was denied, till it had been ascertained by the report of a Master in Chancery, or in some other legal way, that there would be a fund after the payment of the debts of the estate.

Equity. Support of minor legatees *pendente lite*. Decided Judge WORRILL. Muscogee Superior Court. October term, 1867.

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Williams *et al.*, vs. Mobley, ex'r.

In 1847, Brittain Williams made a will, by which he bequeathed to the sons of Thomas A. Williams, his grand-nephews, John, James F. C., B. H., Charles, Brittain, and Ozias S., respectively, certain slaves, to be delivered to them respectively, as they attained their majority, and if either died before his majority, his slaves were to go to the survivors. Thomas A. Williams was made his executor, with power to possess, use and hire all said slaves, till the sons arrived of age, without accounting therefor. And he gave to his said executor all the balance of his estate, in trust, to pay his debts, and then divide the *residuum* between his children, thereafter to be born, at their majority, and if no "new issue," then to the "old issue," as they respectively arrived of age.

In 1855, Thomas A. Williams had died, leaving other children, born since said will was made. Testator made some changes in his will, none of which are material for our present purposes, except the appointment of James M. Mobley his executor, and providing that, besides his commissions, he should have such extra compensation, as executor, annually, as the Ordinary might direct. His executor was to keep his slaves together on the plantation or plantations, and work the same for the benefit of the legatees, so long as it was not injurious to the estate, giving off to each, his or her share as he or she became of age.

In 1863, testator died, leaving real estate, worth, say \$15,000 00, one hundred slaves, worth, say \$50,000 00, and other personalty, worth, say \$5,000 00. Mobley proved the will and codicils, qualified as executor, took possession of the estate, and had the same inventoried. The inventory was made in Confederate currency, then greatly below par.

In December, 1863, the perishable property sold for cash, in such currency, for \$16,171 90, of which legatees took \$4,667 05, of which, also, the executor bought in, for the plantation and use of the minor legatees, \$7,391 55, so that the executor got but \$4,113 30, in cash, and disbursed it according to law. John T., J. F. C., and B. H. Williams were of age, and took their shares, etc., and in December, 1863, the

executor sold eight hundred acres of land, at public out-cry, for cash, in said currency, and it was bid off by said John T. and J. F. C. Williams, at \$13,600 00. They gave their note therefor, due at one day after date, which has been credited with \$5,768 72, in payment of legacies to the makers, etc. The executor also paid Charles L. Williams \$905 75 in property, \$4,037 20 in cash, and his slaves. Brittain, Omas, William, Sarah L., and Joel F. Williams are minors, and have had no legacy but a support of all of them, (except Joel F.,) and their slaves were emancipated by the State.

The executor believed \$15,000 00 would pay all the debts of the estate, and expenses of administration; he paid \$5,000 00 to debts, and \$2,000 00 to such expenses, in such currency. After the war, slaves being gone, etc., he advertised for the creditors, (who had failed to give him notice,) and found it will still take \$14,000 00 to pay the unpaid debts, and the future expenses of administration. The assets of the estate are, the plantation, worth, say \$5,000 00, perishable property, worth, say \$915 60, and notes for negro hire.

To save expenses of many suits against the estate, to get direction how he should act, etc., the executor filed his bill in equity, praying that the creditors should not sue, but come in, and settle under this bill; that the legatees of age, (who had given refunding bonds,) should be enjoined from disposing of the property which they got from the estate, and that said property be held for its *pro rata* share, necessary to pay the debts, (the legatees being insolvent,) and that the equities between the legatees, and between them and himself, should be fully adjudicated.

In October, 1867, while this bill was pending, and undisposed of, a motion was made to provide for the support of said minors, for the year 1867, out of the funds of the estate. The solicitors of the creditors, parties to said bill, resisted the motion, upon the ground that said estate was averred to be insolvent, and because these minors were only nephews of the testator. The Court ordered \$200 00 to be paid to each of said minors, for his support, the same to be paid quarterly.

Williams et al., vs. Mobley, ex'r.

This is assigned as error. At April Term, 1868, the Ju ordered another \$100 00 paid to each, subject to the deci of this Court, upon the other order. (The cause was hel at last term, because of the military order as to old debt

INGRAHAM & CRAWFORD, PEABODY, for plaintiffs in e

BIGHAM, B. HILL, for defendants in error.

BROWN, C. J.

As these minor legatees are not the children of the dece they can not claim a support under section 2530 of the vised Code, which gives the widow and children of deceased, a support for one year, out of the estate, "1 preferred before all other debts."

If they have an estate of their own, the Court of C cery may order their support out of it, pending this li tion. Story's Equity, 1354 and 1356. But they hav right to be supported out of a fund to which they are entitled. As creditors are to be satisfied before legacies paid, and as it is charged by the creditors, that the esta insolvent, and unable to pay all the debts, no order sh have been granted, setting apart a fund out of the estate the support of these minor legatees, who are grand-neph till it was made to appear, to the satisfaction of the Co by the report of a Master in Chancery, or in some other l way, that there was a clear fund after the payment of debts of the estate, out of which the support might be 13 Vesey, 92.

Judgment reversed.

Embry & Fisher vs. Clapp.

EMBRY & FISHER, plaintiffs in error, vs. JULIUS J. CLAPP
defendant in error.

Under the law, as it now stands in this State, an insolvent debtor may make an assignment of his property in trust, *bona fide*, for the benefit of one or more creditors, to the exclusion of others; *Provided*, no trust or benefit is reserved to the assignor, or any person for him.

Assignment. Motion for new trial. Decided by Judge WORRILL. Muscogee Superior Court. May Term, 1868.

Embry & Fisher, in their pending action against Herbert W. Blair, sued out garnishment against Julius J. Clapp. Clapp answered that he owed Blair nothing, and had none of his effects. Embry & Fisher traversed said answer, and there was a trial of that issue. The evidence on the trial was as follows:

FRED. A. ROBINSON, sworn on the part of plaintiffs, testified he knew Herbert W. Blair, formerly Blair & Gennett. Blair had a stock of goods worth some eight to ten thousand dollars, in same store with witness, each occupying half the store. Blair made an assignment early in 1867; first heard of it from outside parties; then asked Blair, and Blair told him he had made an assignment. Swasey, one of the parties for whose benefit the assignment was made, had been in Columbus some two months before the assignment was made; made his headquarters at Blair's store; understood from Blair that Swasey was to send him goods to sell, to keep him employed. Blair expected goods to be sent soon after the assignment was made. A small lot was sent not long after, worth about \$70 00; they were kept separate from the goods assigned. Clapp took possession soon after the assignment was made; can't say whether it was as much as a week. Clapp arranged for the rent of the store, and hired a Mr. Etheridge to take charge of the goods. Blair remained and sold goods as clerk; remained as clerk until the goods were taken from his store, on the first of October last; most of the goods were sold by that time. After Etheridge left, the goods were placed in charge of witness; the proceeds of the sale were turned over

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by witness to Clapp. Clapp did not himself take actual possession, only by his agents and clerks; he remained at his own place of business; think Etheridge was employed soon after the assignment was made; can't tell if it was as much as a week after.

GEO. W. MARTIN, sworn by plaintiffs, testified he, as sheriff had execution against Blair; went to levy upon the goods found them in auction house of McNeil & Co. Blair was there and was selling some goods, and the auctioneer sold some. Blair told witness he must see Clapp about the levy saw Clapp, and he said he would see plaintiffs' attorneys and arrange it. Only a remnant of goods left; not more than fifteen hundred dollars worth.

Plaintiffs then introduced two executions against Herbert W. Blair, one in favor of Embry & Fisher, for fifteen hundred and twenty-one dollars and two cents, principal, and one in favor of Richardson, Northman & Co., for thirty-one hundred and fifty-three 93-100 dollars, principal, both founded on debts existing at the date of the assignment, and two notes, amounting to some eight hundred dollars, on the said Blair, for debts existing at the date of the assignment. Plaintiffs also introduced the deed of assignment, of which the following is a copy:

STATE OF GEORGIA—MUSCOGEE COUNTY.

THIS INDENTURE, made this the 21st day of January, 1867, by and between Herbert W. Blair, of the first part, and John Swasey & Co., Hubbell Swasey & Co., of the second part, and Julius J. Clapp, trustee, of the third part: Witnesseth that for and in consideration of the sum of five hundred dollars in hand paid, the receipt whereof is hereby acknowledged, and the covenants hereinafter expressed; the said Herbert W. Blair hereby gives, grants, assigns, and turns over unto the said Julius J. Clapp and his assignees, all his merchandise and stock in trade, and all sums of money due, or coming to him on mortgage, bonds, notes, bills of exchange, or book account, or other matter whatever, to have and to hold to the said Julius J. Clapp upon trust, to sell and dispose of the goods, wares and merchandise at public or private sale, at said trustee's discretion, and to collect all the money aforesaid, and to pay the same over to John Swasey & Co., one note of twenty-nine hundred and ninety-nine 65-100 dollars, with interest from June 25th, 1866; one of fifteen hundred and nine 26-100 dollars, with interest due March 1st, 1866, with a credit of five hundred dollars,

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er 7th, 1866; and one of five hundred dollars, December 22d, and one note of twenty-nine hundred and eighty dollars and cents, due November 26th, 1866, payable to Hubbell Swasey & it is hereby agreed, that the receipts of the said Julius J. of any of the assigned property, shall be an effectual discharge to when the same shall be given, and the said Julius J. Clapp is authorized to pay all necessary expenses and counsel fees for the protection and disposition of the aforesaid goods and credits. money whereof, we have hereto set our hand and affixed our 1st day of January, 1867.

H. W. BLAIR,	[L. s.]
JULIUS J. CLAPP,	[L. s.]
JOHN SWASEY,	[L. s.]
HUBBELL SWASEY,	[L. s.]

iff then closed his case.

lant then introduced HERBERT W. BLAIR, who that he made the assignment for the benefit of the mentioned in the deed, because he owed them more other persons, and because they had been good of his; bought goods from them, and frequently had pay bills for him for goods bought of others; owed 5,000 00 at the time he made the assignment. Embry and Richardson, Northman & Co., by their Peabody & Brannon, were endeavoring to get him to mortgage his stock to them to secure their debts; he refused to do so; was employed by Clapp as clerk; made no statement as to what he was to get, and has not received any money. An inventory of goods assigned was taken at the time, and amounted to \$8,160 00, at cost prices; nearly about 100 worth of goods remained on hand; the rest had been sent to an auction house to be closed out at auction. and realized about \$3,000 00, over and above expenses, on the assets assigned.

Cross-Examined.

and promised to send him goods to sell on commission, to keep him employed; they were to be sent soon after the assignment was made; expected them soon after; a small amount; only one lot, worth about \$70 00; they were separate from the goods assigned.

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Re-Examined.

After the assignment was made, Swasey promised to send the goods to be sold on commission; said he would send them as soon as this was fixed up.

Defendant then closed.

JOHN PEABODY, sworn for plaintiffs, testified that he was attorney for plaintiffs and Richardson, Northman & Co. tried to secure their debts on Blair; tried to get him to give them a mortgage on his stock; that he refused, saying he had bought his dry goods from them, and groceries from other parties, and thought it would not be right to give them a mortgage on the groceries which were not paid for. With their consent he consented to take a mortgage on dry goods, and Blair proceeded to give it. He was to make out an inventory and then execute the mortgage; did not see him again for several days. He heard of an assignment being made; called on Blair, and said he had made one some ten days or two weeks; after the assignment was made, had a conversation with Clapp, advised him as a friend to put some person other than Blair in possession; Clapp said he did not suppose he had to take actual possession; he then employed Etheridge as clerk.

Plaintiff then closed.

Defendant then introduced an inventory of the stock and goods, amounting to \$8,160 00.

The Court charged the jury that an insolvent debtor might, under the laws of Georgia, prefer one creditor, by a deed of assignment, in trust for the benefit of some to the exclusion of other creditors. The jury found against the plaintiff. Thereupon his attorneys moved for a new trial, upon the grounds that the Court erred in said charge, and that the verdict was contrary to the law and the evidence. The new trial was refused, and this is assigned as error.

PEABODY & BRANNON, for plaintiffs in error, cited Act of 24th February, 1866. Code, secs. 1942, 1943, 1944, 1955. 3d Kelly, Ga. R., 153. 9th Bacon, Abr., 245. 11 Wendell R., 187. 2 John. Ch. R., 576. Burrell on Assignments, 124 and 125.

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RAMSEY & RAMSEY, (represented by JAMES RUSSELL,
defendant in error, handed no brief to the Reporter.

ARNER, J.

There was a motion made in the Court below for a new trial upon two grounds: First, that the Court erred in charging the jury, that an insolvent debtor might, under the laws of this State, prefer one creditor, by a deed of assignment in trust, for the benefit of some to the exclusion of others. Second, because the verdict was contrary to law and the evidence. The Court overruled the motion for a new trial, and this case is now assigned for error here.

Was the charge of the Court right? How stood the old law upon the question of assignments by insolvent debtors, prior to the Act of 1865-6, now incorporated in the new Code? By the 1954th section of the old Code, an assignment made by an insolvent debtor of his property, in *trust* for the benefit of any one or more of his creditors, to the exclusion of any other creditor, in equal participation of such property, was declared to be *void*. By the 1942d section of the new Code, *only* such assignments of property by an insolvent debtor are declared *void*, where any trust or benefit is reserved to the assignor, or any person for him. Why was an assignment made by an insolvent debtor of his property to one creditor, to the exclusion of others, void? Because the old law declared it *should be so*. Why is *not* such an assignment void *now*? Because, the law, as it now stands, *does not declare* that it shall be so. Construing the 1943d section of the new Code, and the 1942d section, together, as being, *in materia*, the intention of the Legislature, we think, is plain, that an insolvent debtor may make an assignment of his property in trust, for the benefit of one or more creditors, to the exclusion of others, so that it is done *in bona fide*, and no trust or benefit be reserved to the assignor, or any person for him. There was no error in the charge of the Court upon this point in the case.

The jury having found the assignment to have been bona

Wallis *et al.*, *vs.* Osteen.

vide under the evidence submitted on the trial, and the Court below being satisfied with the verdict, we will not disturb by ordering a new trial.

Let the judgment of the Court below be affirmed.

B. F. WALLIS *et al.*, plaintiffs in error, *vs.* G. M. OSTEEN
defendant in error.

When the possession of a watch had been awarded to a party by the judgment of a Judge, or Justice, under a possessory warrant, as provided by the 3959th section of the Code, and an action of trover brought to recover the possession of the watch from such party having possession thereof, under such judgment,

Held: that the plaintiff must prove a general property, or title in himself to the watch, to entitle him to recover the possession of it from the defendant.

Trover. Charge of the Court. By Judge WORRILL.
Chattahoochee Superior Court. September Term, 1868.

Osteen had a watch, which both he and Wallis, and E. G. Raiford claimed. That watch was left, by Osteen, with a jeweller to be repaired. When it was sent for, the jeweller, by mistake, sent another watch to Osteen. The defendants, by possessory warrant against Osteen, got possession of this watch, and, to regain it, Osteen brought trover against them. After the evidence was introduced, the defendants moved to dismiss the case, on the ground that the plaintiff had failed to prove property in himself. The Court refused to dismiss the case, holding that plaintiff need not show title; it was not necessary for him to do more than show that he had a right to the possession of said watch. And so the Court charged the jury. The plaintiff recovered. The defendant moved for a new trial, upon the ground that said charge was erroneous.

E. G. RAIFORD, (by Peabody,) for plaintiff in error.

D. H. BURTS, (by the Reporter,) for defendant in error.

WARNER, J.

The question made by the record in this case is, whether the plaintiff in the Court below could maintain his action of trover for the watch, against the defendants, without shewing title in himself thereto? The defendants had the possession of the watch, under the judgment of a Judge, or Justice, as provided by the 3959th section of the Code; that possession was, *prima facie*, lawful, as against the plaintiff, and to allow him to recover the watch from the defendants, on proof of his *former possession alone*, was but reopening the question of possession of the watch, which had been adjudicated under the possessory-warrant proceeding. The judgment in that proceeding determined the *right* of possession to the watch, as between the parties, to belong to the defendants. In order to deprive them of that *lawful* possession, thus acquired, the plaintiff was bound to show something more than his former possession of the watch; he was bound to show a *right* to the present possession of the watch as against *the defendants*. If he had shewn, by the evidence, a general property in the watch, or title thereto in himself, then he would have shewn his *right* to the possession of it by *construction of law*, as against the defendants, who relied on their *possession alone*. See 2 Greenleaf's Evidence, 528, section 640. We think the Court below erred, in holding that the plaintiff was entitled to recover the watch from the defendant, under the evidence in this case.

Let the judgment of the Court below be reversed.

Lamar vs. Glawson.

MARY LAMAR, plaintiff in error, vs. JOSEPH GLAWSON
defendant in error.

(Held up last term because of military order.)

When there is evidence before the jury on the trial of a case upon a material point involved in such trial, it is error for the Court so to charge the jury as to *exclude* from their consideration such evidence.

Assumpsit. Charge of the Court. By Judge COLE. Before the Superior Court. May Term, 1867.

This was complaint by Joseph Glawson against Mrs. M. Lamar, upon an account for "services as an overseer, from January 1st, 1860, to January 1st, 1861, \$550 00. The action was brought in October, 1861. The general issue was filed.

On the trial, the plaintiff read the answers of one Whidby to interrogatories, as follows: Plaintiff was on defendant's plantation, in Jones county, as overseer, in the year 1859 or 1860—(1860, I think, don't recollect distinctly.) In the month of January or February of that year, plaintiff came to Whidby's, and asked him to go to Macon with him to see the defendant. They went to her house in Macon. Plaintiff said to her, "I have come down to see you to know why you wish me to quit your plantation." Plaintiff asked her if she had not given her satisfaction, and done all for her he could. She said that he had done more for her than any man had had on the plantation for years, that it was not on account that she was turning him off; that some of the negroes on the plantation belonged to her mother, who was old and childish, and who said, if he staid on the plantation her negroes should not stay there, and, therefore, herself was unable to keep him there. Plaintiff replied to her, "Mrs. Lamar, your mother did not hire me, I have nothing to do with her; you hired me, and I had rather take the \$550 00 than to be turned out of business at this season of the year. She said she knew it was hard, but she could not help it. Plaintiff then said to her, "You were to pay me \$550 00, and I think it is hard that I should be turned off at this season of the year, and I am going to have

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money." The witness stated that he knew nothing of the terms of the contract, except what he had learned in that conversation. He knew that plaintiff entered upon the discharge of his duties as such overseer, and was dismissed by defendant for the reasons aforesaid. Plaintiff's character as an overseer was good, so far as the witness knew; he knew nothing against it; the plaintiff received the highest wages of any person known by witness as overseer in the county; his character as overseer and business man as good as any, if not better than any man's in the county. On cross-examination, he stated that he did not know what plaintiff did on the plantation; that he commenced business there at the first of the year, and was turned off in January or February, (he thought in January,) about the middle of the month. During the same year, plaintiff was employed by Mrs. Lowther, as overseer, on one of her plantations, at what wages the witness did not know.

Plaintiff closed. The defendant's attorney read in evidence the answers of Miss MARY L. LAMAR, who testified as follows: During Christmas-week of 1859, the negro men and some of the women came from the plantation, and told her mother, defendant, that they would not stay there, if plaintiff was employed as overseer for 1860. The negroes were still at her mother's, when witness' brother came from New York, on the first day of January, 1860, and he, learning the state of matters from the defendant, went to the plantation on the second day of January, 1860, and paid plaintiff and dismissed him.

Here, the testimony closed. Defendant's attorneys requested the Court to charge the jury, 1st, that if the contract upon which the suit was brought, was for services of an overseer, to be performed by, and during, the year 1860, and was made previous to the first day of January, 1860, unless the same, or some memorandum thereof, was reduced to writing, and signed by the defendant, the same was incomplete and void.

2d. That to authorize the recovery by the plaintiff, from the defendant, for the year's wages, the plaintiff must have

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held himself in readiness to perform his part of the contract whenever called upon by the defendant to do so.

3d. That if they believed the plaintiff to have received remuneration for personal services rendered during the year 1860, from other parties, defendant was entitled to be credited with the same against plaintiff's claim.

The Court refused to give in charge either of said requests, stating, in the hearing of the jury, that there was no evidence to authorize either of them, and further, that as to the first he did not believe it was law in 1860.

The Court charged the jury, that the only question for them to consider was, whether or not defendant made the contract sued on, and that if she did make such contract as testified to, plaintiff was entitled to recover the amount agreed upon in said contract. The verdict was: "We, the jury, find for the plaintiff, and assess the damage at \$200 00, without interest."

Defendant's attorneys moved for a new trial upon the grounds, that the Court erred in refusing to charge as requested, in stating his said reasons therefor in the hearing of the jury, and in charging as he did, and because the verdict was excessive, and unsupported by the evidence, and strongly and decidedly against the weight of the evidence.

BACON & SIMMONS for plaintiff in error.

W. POE, (by the Reporter,) for defendant in error.

WARNER, J.

We find no error in the Court below, in refusing to charge the jury as requested by defendant's counsel. The evidence in the record is, that the brother of the witness "went to the plantation on the second day of January, 1860, paid the plaintiff, and dismissed him." The Court charged the jury, "that the *only question* for them to consider was, whether or not the defendant made the contract sued on, and that if she did make such contract as testified to, the plaintiff was entitled to recover the amount agreed upon in said contract."

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view of the evidence, as to the *payment* of the overseer, think this charge of the Court was error, as it *excluded* the consideration of the jury the question of payment his services. Whether the evidence of payment was really satisfactory or not, it was the right of the defendant to have that question considered by the jury, in as much as there *was evidence* before them, upon that point in the case. Let the judgment of the Court below be reversed.

ROBERT C. BRYAN, *et al.*, executors, plaintiffs in error, vs.
ZENA DOOLITTLE, defendant in error.

On a *feme sole* gave her note for fifty dollars, and afterwards married in 1862, before the adoption of the Code, her husband receiving through the wife property more than sufficient to pay the debt, and the husband died before any judgment was obtained against him for the debt of the wife:

It, That ~~as~~ the parties were married before the adoption of the Code, the husband was liable for the debts of his wife *only* to the extent of the property received through her, when judgment was recovered against him therefor *during the coverture*. The will was competent evidence for the purpose of shewing, that the parties were married prior to the adoption of the Code in 1863, as it was dated 1st July, 1862, and recognized therein the maker of the note to be his wife at *that time*.

Complaint. Liability of husband for wife's debt. Decided by Judge COLE. Houston Superior Court. February term, 1868.

This was complaint in favor of Zena Doolittle, brought in 1866, against Robert C. Bryan and Joseph W. Wimberly, as executors of Dempsey Brown, deceased, upon the following promissory note:

On the day after date, I promise to pay Zena Doolittle or bearer fifty dollars in value received, January 1st, 1861. F. MIMS."

The plaintiff's attorney read in evidence said note, shewed the fact that the maker was a widow at the date of the

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note, and that, afterwards, in 1862 or 1863, she married said Brown; that, at the date of the marriage, she possessed property, real and personal, including an house and lot in Perry, Houston county, Georgia, and several slaves, which, it was understood, went into Brown's possession; that, in the summer or fall of 1864, Brown died, and in the latter part of 1865 his widow died. It was admitted that Brown received a sufficiency of property from his said wife to pay said note.

The defendants' attorney offered to read in evidence a certified copy of the last will and testament of said Brown, dated 31st of July, 1862, the third item of which was as follows: "I give and bequeath to my beloved wife, Sarah A. F. Brown, to have and to hold forever, the following property, to wit:—(Certain slaves, naming them), which slaves I acquired by my marriage to my said wife, and my house and lot in the town of Perry, in said county, which house and lot I also acquired by my marriage, and my horses and carriage, all the household and kitchen furniture that I acquired by my marriage to my said wife, and also five thousand dollars in cash: all of which said property and cash I give to my said wife *in lieu* of, and in the place of, her dower in and to all the lands I may own at the time of my death," and a receipt, dated the 17th January, 1865, by which Mrs. S. A. F. Brown acknowledged that she had received from the executors the said bequeathed property. Plaintiff's attorney objected to said testimony upon the ground of irrelevancy. The Court rejected this testimony. None other was offered. It was conceded that Mrs. Brown and F. Mims were the same person. The Court charged the jury that Brown was bound for the payment of the debts of his wife, existing at the date of their marriage, to the extent of the property received by him from her, and that no subsequent disposition of that property, by will or otherwise, to her or to another, relieved him, or his estate after his death, from said obligation, even though both he and she died before they were sued on said debts.

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The verdict was for \$50 00 and interest, against the defendants. The defendants' attorney says that the Court erred in ruling out the testimony offered, and in charging the jury as he did.

S. D. KILLEN, (represented by the Reporter,) relied on *Nicholson and wife vs. McWhorter & Wilborn*, 13 Ga. R., 467, and said that no change in the law *after* the marriage could affect this case, (if there was any such change,) and therefore the will was admissible to show when they married.

C. C. DUNCAN, for defendant in error, did not reply.

WARNER, J.

There are two questions presented by the record in this case for our consideration and judgment. First, as to the liability of the husband for the debt of his wife. Second, the rejection of the will when offered in evidence by the defendant, in the Court below. We will consider the rejection of the evidence offered first. In our judgment, the will offered in evidence should have been admitted, for the purpose of showing that the parties were married *prior* to the 1st of January, 1863, the time when the Code was adopted. The witness who testified as to the *time* of the marriage, says, the parties were married in 1862 or 1863. The will is dated 1st of July, 1862, in which the maker of the note is recognized as the wife of Brown at *that time*. By the common law, the husband is not liable to pay the debts of the wife contracted by her before marriage, unless judgment was obtained against him therefor *during the coverture*; 2 Kent's Com., 145; *Nicholson and wife vs. McWhorter & Wilborn*, 13 Ga. R., 470. The Act of 1856 *restricts* the liability of the husband for the debts of the wife, to the amount of the property received through her, but does not *further* interfere with the common law rule of liability. If the debt is not reduced to judgment against the husband during the coverture, he would not be liable, even to the *extent* of the property received

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through her; but in no event, *beyond* that amount. The Act of 1856 only defines the *extent* of the husband's liability when sued for his wife's debts, according to the law as it then existed. The Old Code goes further, in the latter part of the 1701st section, and declares, that "the property received through the wife *shall be liable* for the payment thereof." That Code, however, did not take effect until the first day of January, 1863, so that the law was just as the Act of 1856 left it, in regard to the liability of the husband for the debts of the wife, contracted by her before marriage. See Revised Code, sec. 2. The husband, in this case, only assumed such liability for the debts of his wife, as the law imposed on him *at the time* of his marriage, which was in 1862, *before* the adoption of the Code. As the law then existed, in 1862, the husband was liable for the debts of his wife to the *extent* of the property received through her, when judgment was recovered against him therefor, *during the coverture*; but as no judgment was recovered against the husband in this case, for the debt of his wife, contracted before marriage, *during the coverture*, his estate is not liable to pay it, although he may have received property through his wife, sufficient for that purpose. Under the common law rule, it made no difference whether the husband received property through his wife or not; if his liability was not fixed by a judgment *during the coverture*, he was not bound, in law, to pay the debt.

Let the judgment of the Court below be reversed.

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Bailey vs. Strohecker.

AMUEL F. BAILEY, plaintiff in error, vs. E. L. STROHECKER, defendant in error.

When an attachment was levied upon fifty shares of capital stock of a corporate company, and sold at sheriff's sale, it was the duty of the sheriff to give a certificate of purchase to the highest bidder, and on presentation of such certificate to the proper officer of the corporation, it was his duty to make the necessary transfer of the stock to the purchaser on the books of the company. In such case, the sheriff does not put the purchaser in possession, but the proper officer of the corporation is, *pro hac vice*, a public officer under the Code, charged with that duty, and if he refuses to do it, *mandamus* is the proper proceeding to compel its performance.

Mandamus. Demurrer. Decided by Judge COLE. Bibb Superior Court. June Term, 1868.

On the 30th of April, 1866, Samuel Bailey sued out attachment against Jerry Cowles, as a non-resident of this State. It was levied as follows: "I have this day levied this attachment on fifty (50) shares of stock of the Empire State Iron and Coal Mining Company, and served E. L. Strohecker, President, with a copy of this attachment, 30th April, 1866, at 12½ P. M.

PAT. CROWN, Deputy Sheriff.

On the 2d of July, 1866, Bailey filed his declaration thereon, declaring upon a promissory note made by Cowles, payable to Bailey.

The jury found in favor of Bailey for \$750 00, with interest and costs of suit. Judgment was entered, in favor of Bailey against Cowles, defendant, and Strohecker, President, as garnishee, and the Court ordered that said attached shares of stock should be advertised and sold by the sheriff. The officer levied said *fi. fa.* upon said fifty shares, and at sheriff's sale, sold said shares to Bailey, who bid them off at fifty dollars, and the officer so certified on said *fi. fa.* But Strohecker refused to transfer the stock to Bailey, stating substantially the facts. Bailey prayed for *mandamus nisi* against Strohecker, to compel him to make such transfer. The

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rule *nisi* was issued and served. Strohecker's answer is not material. He said that this was an effort on the part of Bailey to enforce a private right against him (Strohecker) in his individual character, or as a private officer of a private corporation, and that therefore the Court had no jurisdiction.

Besides this answer, Strohecker's attorney filed a demurrer, averring, among other grounds founded on the form of the proceeding, etc., that the Court had no jurisdiction to issue *mandamus nisi*, nor to make *mandamus* absolute upon said petition and other proceedings.

The Judge sustained the demurrer upon said grounds. His dismissal of the petition upon demurrer is assigned as error.

S. T. BAILEY, (by the Reporter,) said *mandamus* is a writ of right. New Code, sections 4980, 4170, 3130. It is the proper writ where there is no other specific remedy. Bacon's Abridg. *Mandamus*; *Dudley's Ga. R.*, 37; 1 *Kelly Ga. R.*, 271; 2 *Kelly Ga. R.*, 290. *Mandamus* is the remedy in this case. New Code, section 3213; *Manor vs. McCall*, 5 *Ga. R.*, 522; *Gresham vs. Pyron*, 17 *Ga. R.*, 266; *Napier et al. vs. Doe et al.*, 12 *Ga. R.*, 170; *Habersham vs. Savannah and Ogeechee Canal Company*, 26 *Ga. R.*, 665.

HERNY W. COWLES, (by B. HILL,) for defendant in error, furnished no brief to the Reporter.

BROWN, C. J.

We are satisfied the Court erred in ruling that *mandamus* was not the proper remedy in this case. Section 3222 of the Revised Code points out the mode of levying an attachment upon the stock of a corporation, owned by the defendant in attachment.

Section 3223 declares void all transfers of his stock, made by the defendant, after the attachment has been levied, and provides for the sale of the stock by the sheriff.

Section 3224 declares that "certificates of purchase shall be granted by the officer selling, as prescribed in case of ex-

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entions, and on presentation of such certificates to the proper officer of said corporation, it shall be his duty to make such transfer on the books if necessary, and afford the purchaser such evidence of title to the stock purchased, as is usual and necessary with other stockholders."

The usual course is, for the sheriff who sells the property, which is not held adversely to the defendant in *fi. fa.*, to put the purchaser in possession. In case of the sale of stock in a corporate company, the sheriff can not do this, as the property is not tangible, and he has no such control over the books of the company as enables him to make the necessary transfer of the stock, which he has sold to the purchaser. In view of this difficulty, the Legislature has substituted the proper officer of the corporation for the sheriff, and has made him, *pro hac vice*, a public officer, charged with the performance of this very duty, which he is required to perform upon the presentation of the certificate given by the sheriff to the purchaser at the sale. If he refuses to do this duty he may be compelled by *mandamus*.

Judgment reversed.

JAMES C. MCBURNEY, plaintiff in error, vs. PATRICK MC-INTYRE, defendant in error.

1. A tenant has no right to sub-let the premises without the consent of the landlord, and when done with his consent, the sub-tenant is the tenant of the landlord, and he, and not the tenant, has a right to proceed against the sub-tenant, in case he holds over.
2. When A, the tenant, sub-let to B, who was also required to pay rent to the landlord for the part sub-let, and at the end of the year for which they held the premises, A and B were rivals in securing a lease from the landlord for the ensuing year, and both claimed to have rented the premises for the next year, and B remained in possession, the relation of landlord and tenant did not exist between them.
3. When A applied to the landlord to lease the premises for three years, which was refused, but it was agreed that he might rent for one year, and that the written lease should be executed at another time, and A laid down his notes for one year's rent on the landlord's table, which

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A afterwards claimed as the evidence of the contract, the notes not having been returned:

Held, that the language used in the notes must be taken most strongly against A, and that the expression in the notes that they are for the rent of the store occupied by A, will not embrace a lot adjoining the store-house, fenced off to itself, which usually went with the store before it was so fenced.

Landlord and tenant. Motion for new trial. Decided by Judge COLE. Bibb Superior Court. May Term, 1868.

McIntyre sued out a warrant against McBurney, as his tenant, holding a certain lot over and beyond his term. McBurney denied holding under him. The jury found against McBurney for double the proven rent. His attorney moved for a new trial, upon the ground that the verdict was contrary to the charge of the Court, and against the weight of the evidence. What the charge was does not appear. The new trial was refused, and this is assigned as error. For so much of the evidence as is necessary to understand the cause, see the opinion of the Court.

O. A. LOCHRANE for plaintiff in error.

WHITTLE & GUSTIN, (by A. W. HAMMOND & SON,) for defendant in error.

BROWN, C. J.

1. Under the 2253d section of the Revised Code, the tenant has no right to impose a sub-tenant upon the landlord without his consent; and if it is attempted, we hold that the sub-tenant becomes the tenant of the landlord, if he elects to recognize him as such, and not the tenant of the tenant who placed him upon the premises, without the consent of the landlord; and the landlord, so recognizing the sub-tenant, may proceed against him for holding over; or he may refuse to recognize the tenancy and proceed to expel the person placed upon the premises by the tenant, without his consent, as an intruder, in any manner prescribed by law for the expulsion of trespassers or intruders. Any other rule would

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be most unjust and unreasonable, as it would put it in the power of the tenant to place upon the premises persons the most objectionable to the landlord, or such as might use the premises for purposes the most disagreeable to him.

In this case, there seems to have been a dispute whether Mrs. Ferrell, the owner of the premises, or McIntyre, who occupied the store as her tenant for the year 1867, had the right to use or rent the vacant lot by the store; and as McBurney found it necessary, in putting up his building, to pass over that lot, and to place some of his building material upon it, he paid rent to both the owner and the tenant. He was therefore the tenant of Mrs. Ferrell, the owner, and not of McIntyre, who held under her; and if he held over, the owner, and not the tenant, had a right to proceed against him.

2. When McIntyre's lease was about to expire, he and McBurney were rivals in securing a lease from Mrs. Ferrell, the owner, and both claimed to have leased the vacant lot from her; and McIntyre then proceeded against McBurney, as his tenant, for holding over. Under the facts of this case, as disclosed by the evidence, we hold that the relation of landlord and tenant did not exist between them, and that this proceeding can not be maintained.

3. The rent notes which McIntyre drew and left on Mrs. Ferrell's table, and which, as they were not returned, he claimed to be the evidence of the contract between them for the ensuing year, must be construed most strongly against him as the maker. And the expression in the notes that they are for the rent of the store occupied by him, will not be construed to embrace the lot adjoining the store, which formerly went with it, but which had, within the last year, been fenced off to itself, and which Mrs. Ferrell did not understand she had rented with the store-house, as she rented it to McBurney the next day for the ensuing year.

Judgment reversed.

Barron vs. Burney et al.

BENJAMIN F. BARRON, plaintiff in error, vs. **JOHN W. BURN-
NEY, et al.**, executors *de son tort*, etc., defendants in error.

1. The heirs at law of an estate may, as between themselves, divide the estate by agreement, without administration; but, as against creditors, if they convert to their own use the personal effects, they are executors *de son tort*, and are liable as such.
2. Although, under the Code, executors *de son tort* can not get credit for any debt they may have paid; yet, if, in good faith, they have furnished the widow her year's support, according to her circumstances in life, and this has exhausted the effects they have used, they are not liable, except for the excess. The claim of the widow is not a debt, but a special provision allowed by law, in preference to any liens or debts held by creditors.
3. There being, in this case, no evidence of the actual payment, by these heirs, of the widow's year's support, we reverse the judgment of the Court below in refusing to grant a new trial.

Assumpsit. Distribution of estates. Tried before Judge
FOSTER. Jasper Superior Court. October Term, 1867.

On the 2nd of March, 1861, John W. Burney, Jr., as principal, and John W. Burney, Sr., as security, made and delivered to said Barron their promissory note for \$3,630 00, due 10th of November, 1861. John W. Burney, Sr., died in December, 1864, leaving as heirs and distributees of his estate John W. Burney, Jr., James S., William, J. J. H., C. C., Lucy and C. R. Burney, and Mary B. and T. M. Swanson. On the 22d of February, 1865, these heirs and distributees, because there were certain matters of controversy touching the settlement and distribution of the estate, entered into a written agreement substantially as follows: There was to be no administration. They were to submit to the arbitrament of certain arbitrators, therein named, all questions of law or fact which might arise in determining their several interests. These arbitrators were to determine what amount of property, or money, or both, should be allowed the widow of John W. Burney, Sr., for her year's support, and what furniture she was entitled to under section 2531 of the Code of Georgia, and also what was her entire interest in said estate, both real and personal, taking into account the advancements which

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were made to the children of said deceased while living, and to determine all other questions which might arise touching the same. After ascertaining and setting apart for the widow so much of the estate as they should think her entitled to, then the arbitrators were to make those who had had no advancements, equal to those who had had advancements, and distribute the residue, if any, equally between the parties, (except the widow) according to law, as the arbitrators should think proper.

The arbitrators were to consider a claim of F. M. Swanson for \$1,000 00, and one of John W. Burney, Jr. for \$3,000 00 against the estate, and determine whether said claims should be paid in Confederate currency or property, and, if in property, at what valuation. The house and lot where the widow resided, a store-house in Monticello, a lot at the Springs, and all the other real estate out of Jasper county, and three slaves, (named,) were not to be covered by this arrangement. All forms were to be waived, and the award was to be final.

As to the balance of the property, to-wit: that not covered by the arbitration, they authorized John W. Burney, Jr. to sell it publicly or privately, and to settle and pay the debts of deceased, and generally to close up the business of deceased, and each bound himself to John W., Jr. to pay his *pro rata* share, etc. Pursuant to this agreement, there was a sale of deceased's personal property, on the first Tuesday in March, 1865, when his stock, carriage, wagons, etc., were sold. Who conducted the sale, or who received the money, did not appear. Nor did it appear whether the arbitrators made any award, nor *whether any part of the proceeds of the sale was paid to the widow.*

In June, 1866, T. M. Swanson obtained letters of administration on the estate. The inventory of the household goods, etc., of deceased, footed up \$814 50, and the following lands: sixteen hundred and eighty-one acres in Jasper county, appraised at \$6,724 00; one thousand and sixty-five acres of old lands, at \$1,000 00; house and lot in Monticello, at \$800 00; two-thirds interest in the store-house, at \$600 00; and a house and lot at the Indian Springs, at \$400 00.

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The inventory also contained various accounts made March, 1865, in favor of the estate against the heirs and distributees, amounting to \$13,842 00, for slaves, etc. (We suppose these are the purchases made by them at said sale, there is no other evidence on the subject.) Over half of the purchases were by the widow.

Barron sued all these heirs and distributees, as executors *de son tort*, upon said note, and upon the trial shewed the foregoing facts. On the cross-examination, one of the witnesses stated the value and situation of the property of deceased, the circumstances of the family, etc., and gave it his opinion that all the property of deceased, exclusive of the slaves and lands, was not sufficient for the support of the family for three months. This testimony came in over the objection of plaintiff's attorneys. The witnesses thought that \$1,500 00 or \$2,000 00 would have been necessary for the support of the widow for one year, and that it was necessary to sell the personalty to support the family. This was also objected to, but the objection was overruled.

After the argument, the plaintiff's attorney requested the Court to charge the jury: 1st. That if the defendants sold the personal property of deceased and purchased the same, it was a conversion, and the defendants were liable to the plaintiff for double the value of the property. 2d. That if the defendants acknowledged their liability to the administrator, and returned the same to him, did not release them from liability as executors *de son tort*. 3d. That if the defendants sold said personal property, and applied none of the proceeds to the support of the widow, but converted the same to their own use, then they became liable for double the property so converted, and the plaintiff could recover that amount, if his claim was sufficiently large, etc.

The Judge gave in charge the second request; he gave the third with the words, "or other lawful uses," added immediately after "widow," and he modified the first request by charging, that to make a party executor in his own wrong in Georgia, he must, without authority of law, wrongfully interfere with, or convert to his own use, the personalty of

deceased individual whose estate has no legal representative, and that if said defendants, or any of them, had so done, he, or they, were liable to the plaintiff to double the value of the property so intermeddled with or converted, (not beyond plaintiff's claim,) and that if there was a common intent to do such wrong, all are so liable. But he instructed the jury, also, that the taking possession of the lands and slaves of a deceased person, by his heirs-at-law, did not make them executors in their own wrong; that until it appears that such property is necessary for the payment of debts, such possession by the heirs is neither unlawful nor wrongful; it is necessary that some one take charge of the estate till some legally appointed authority is ready to receive it. The heirs were the proper parties to do this, and their taking it, protecting and caring for it, does not make them executors in their own wrong; and if it were necessary to support the slaves or the beasts, to sell a part of the perishable property, it was lawful for them to do so.

As to the liability of the widow, he charged that she was entitled to dower in the lands of which her husband died seized and possessed, and of the dwelling-house and furniture therein, from the death of her husband until her dower is assigned, and that her use and occupation thereof, *ad interim*, was not unlawful nor wrongful, and did not make her or her co-defendants executors in their own wrong; that her claim for a year's support was *above all other liens* on the husband's estate, even if it exhausted the estate, and if she and her co-defendants, in good faith, appropriated a portion of such estate, not beyond what she was entitled to, in good faith, to such support, that fact would not make them or her executors in their own wrong.

The plaintiff being dissatisfied with the verdict, (what it was does not appear,) sued out his writ of error, and says that the Court erred in allowing said evidence to be introduced over his objections, in modifying the requests to charge as he did, and in each and every part of his charge as to what would render the defendants executors *de son tort*.

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GEO. T. BARTLETT and JAS. H. BLOUNT for plaintiff in error.

LOFTON & HUTCHINSON for defendants in error.

McCAY, J.

1. As between themselves, we see no objection to heirs at law, who are all *sui juris*, dispensing with administration and settling the estate by an agreement among themselves.

But as against creditors, if they do this, they are executors *de son tort*, and are liable as such. If they have converted the property they are responsible for it, under the law governing suits against executors *de son tort*, and they cannot escape this by turning over to the administrator, afterwards appointed, the notes they took from the purchasers. At common law, it was presumed that every person who assumed control over the effects of a deceased person had his possession a will, and he was bound to account for that went into his hands. In this *account* he was entitled to such credits as any executor would be. If he produced no will, he could set off no debt due himself, but any other proper payments were allowed, until he accounted for all proven to have gone into his hands.

Under the Code, section 2406, it is provided that one who, without authority of law, wrongfully intermeddles, and converts to his own use the personalty, shall be liable for double the value of the property so possessed or converted. Nor can he set off against this liability any debt due himself, or any debt he may have voluntarily paid.

2. The simple taking possession of this property by the heirs, and the use of a portion of it for the preservation of the remainder, or the application of it to the support of the widow and children for twelve months, by the heirs-at-law would not, in our judgment, make them liable, under this section, to the penalties and burdens specified. But the proof here is, that they sold the property, converted it to their own use, and, as against the creditors, we hold them liable to the penalties of the statute.

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they did not *wrongfully* intermeddle, so long as they duly preserved the property, or used it for the twelve months' support.

We agree with the Court below, that if they had simply used the property to supply the widow with her year's support, allowed her by law, and to take care and keep in good condition the negroes and stock, they would not be liable.

As they were the heirs-at-law, their interference was not malicious nor meddlesome, and if they did not convert the property otherwise than to preserve it, and to support the widow, they did not act wrongfully.

The right of the widow to her support for a year is not a debt of the intestate. In a strict sense, it is a provision, an allowance, higher than any debt, and if these heirs have neglected her, they may set that up.

But the evidence does not show they did this. That, it is true, was one of the terms of the agreement, but there is no evidence that this agreement was ever performed, except to sell the property.

We think, therefore, there ought to be a new trial in this case.

M. WILLSON *et al.*, executors of Matthew Whitfield, deceased, plaintiffs in error, vs. MATTHEW C. WHITFIELD *et al.* legatees, defendants in error.

When a testator appointed four executors to execute his will, and an application was made to the Ordinary to require three of the executors to give bond and security according to the provisions of the 2411th section of the Code, upon the ground that said executors were *mis-managing* the estate of the testator, and said cause having been tried in the Superior Court, on appeal from the Court of Ordinary, and the jury having returned a verdict requiring the executors to give bond and security, and a motion having been made in the Court below for a new trial, which was overruled:

And, First, that the *insolvency* of the executors is not *per se* a sufficient ground to require the executors to give bond and security, especially,

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when it appears from the evidence in the record, that their *pecuniary* condition is as good *now*, as it was at the time of their appointment by the testator.

Second, that the turning over to one of the executors, by the will, shortly after the testator's death, of a large amount of promissory notes and other evidences of debt, which, said executor has continued to hold and retain in his possession, with the consent and approbation of two of the other executors, against the *protestation* of the fourth named executor, is not *per se* such *mismanagement of the estate*, as will require the executors to give bond and security under the law.

Third, that the Court erred in charging the jury, "that if more than one qualifies, each is authorized to discharge the usual functions of an executor, but all must join in executing a *special* trust, and I refer you to the will to ascertain whether it contains a *special* trust," whereas the Court should have charged the jury, whether the will did, or did not, contain any *special* trusts, that being a question of *law* for the Court to decide, and not a question of *fact* to be referred to the jury.

Fourth, that the Court erred in not granting a new trial, upon the ground that the verdict of the jury was strongly and decidedly against the weight of the evidence, as to the mismanagement of the estate by the executors.

Equity. Charge of the Court. Tried before Judge SPEER, Jasper Superior Court. April Term, 1868.

Matthew C. Whitfield, in his own behalf, and John B. Whitfield, Boling Whitfield, and Comar B. Whitfield, minors, by their next friend, the said Matthew C. Whitfield, by bill in equity, made the following case:

1st. They are the only grand-children of Matthew Whitfield, late of said county, deceased, and are the chief and residuary legatees under the will of said Matthew Whitfield.

2d. Leroy M. Willson, Pleasant Willson, and John B. Patterson, three of the executors under said will, are *mismanaging* the estate of said Matthew Whitfield, and are not only disregarding, but plainly violating the directions and provisions of said will.

3d. Said three executors have taken forcible possession of all the assets of said estate, and so keep them to the exclusion of William H. Matthews, the other executor, and are compelling said Matthews to resort to legal process to join in the execution of said will, thus incurring expense, litigation, and embarrassment in a wicked, willful and unnecessary

ner, and in direct disregard of the will appointing said
thews one of the executors.

h. Said three executors are not keeping up the farms of
tor as they are expressly required to do by said will, but
illegally sold all the perishable property, mules, stock,
visions, and tools, and have rented out the farms in
et and willful contravention of the directions of the will.

th. Said three executors have taken possession of the
te and rendered said William H. Matthews unable to
nte the will; have entirely failed and refused to provide
ation and support for the grand-children of the testator,
hey are expressly required to do by said will.

th. Many of the debts due said estate, being old debts,
said executors refuse to make such settlements with
tors as would be to the manifest interest of the estate,
such as the legatees (the real parties in interest) are
ious should be made, in view of the great uncertainty of
solvent condition of the people. Said executors refuse
take property for such debts, and refuse to consult the
rest of the legatees, but seem determined to use said
te exclusively for their own interests, as if the assets
onged to them.

th. Said three executors are all related to each other,
ng father, son and son-in-law, and are all insolvent, and
ve become so, or have developed so, since the execution of
d will; and said Patterson has changed his residence from
county of Jasper since the death of testator, and now
reatens to remove the administration to another county,
ere the said three executors now reside, and solely for their
n convenience and interest, and without any regard to the
terest of the legatees, but to promote their own business,
nt of speculation and trade.

8th. Though one of the grand children has arrived at age,
nd the income of the remainder of the estate would be am-
ly sufficient, and more than sufficient, to support and educate
he remaining orphan children, said three executors refuse to
st apart that portion to which the said grand child, arriving
age, is entitled to under the will.

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9th. This absorption of the whole estate by a portion of the executors, constituting one family, the exclusion of the remaining executor, who is solvent and who has the confidence of the legatees, the reduction of all the estate they can to money, and the refusal to use the money as plainly directed by the will, and all by persons who are insolvent in fact, and traders by profession, and the use of large sums in litigation and attorney's fees, in their efforts to maintain this selfish and illegal use of the estate, is not only mismanagement, but is endangering the entire estate. Complainants believe and represent that it will result in great and irreparable loss to the estate, if the said three executors are not required to give bond and security for the faithful administration of the trust, or, in default thereof, to surrender the assets without delay, and be removed from the execution of said will.

They prayed for an order requiring said three executors to give bond and security for the faithful execution of the trust, or show cause to the contrary, and on failure to give bond, that the letters testamentary to them be revoked, and the assets be delivered to said William H. Matthews, as executor under said will, or to such other person or persons as the Court should appoint to represent the estate.

Leroy M. Willson and Pleasant Willson, two of said executors, answered, that since their qualification, they had no possession of any of the assets of the estate, and had performed no act as executors whatever. They denied any concert or combination with either of the other executors for any purpose.

John F. Patterson, the other of said three defendants, admitted allegation number one to be true.

He denied mismanaging the estate and violating the provisions of the will, as charged in allegation number two.

He denied having taken any other than peaceable possession, without force, of any portion of the assets of said estate. He obtained possession of said assets, so far as as they were delivered to him, and kept them to the exclusion of all persons, as he was lawfully entitled to do, and as he believed it his duty to do.

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He admitted that he was not keeping up the two farms of testator, kept up by him at his death, but said he was renting parts of the land, whenever practicable, that were connected with the two farms kept up by testator at the time of death, but sold a part thereof, as he was authorized to do. He sold the perishable property, believing it to be to the interest of the estate. In this, William H. Mathis, the other executor concurred, and was present at the sale. The sale was advantageous to the estate.

He denied neglecting the education and support of the orphan grand children of testator.

He denied refusing any settlement of any old debt when a settlement was offered, and would, if accepted, in his opinion, have been beneficial to the estate. He had not misled the complainants, but had conferred with counsel for his own safety in precipitately accepting such offers of offers to transfer such property as they chose to offer in payment of debts. When he had declined such offers, no money or other thing had been paid.

He admitted his relationship to the Messrs. Willson, his executors. He denied being insolvent.

He said he changed his residence in 1865, and desired the privilege of making his returns in Morgan county. He was not speculating on the monies of the estate.

In response to the 8th specification, he answered that he had been notified of large claims against the estate, involving thousands of dollars which had not yet been sued, and that these matters were adjusted, or important collections made, he must decline a final settlement with Matthew Whitfield.

He denied all the allegations, arguments, inferences and conclusions contained in the 10th ground. He said he had paid no attorney's fees as yet, to any person, beyond the sum of one hundred and fifty dollars.

The will, alluded to, was as follows :

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“GEORGIA—JASPER COUNTY.

“ I, Matthew Whitfield, of said county and State, being of disposing mind and memory, do make, publish, and declare this my last will and testament, in manner and form following, to-wit: first revoking all other wills and testaments and codicils to such wills attached, heretofore by me at any time made:

“ 1st. I will that my debts be paid as soon as practicable.

“ 2d. I give and bequeath to my beloved wife, Martha, one-half of my household and kitchen furniture; also, one-half of my horses, mules, cattle, hogs and sheep, plantation tools, plows, gear of every description, wagons and carts attached to my home place; also, one-half of all my provisions and provender of every description, which may be on hand at the home place, together with the one-half of my cotton crop that may be growing or matured on my home place, forever in fee simple. I also give and bequeath to my said wife, Martha, the sum of seven thousand five hundred dollars cash, to be paid to her, without interest, at the expiration of twelve months from my death, to be hers forever.

“ 3d. I give and bequeath to my wife, Martha, the following lots or parcels of land, situated in said county, namely:

* * * * *

Intending this (the last named lot) for fuel and plantation uses, I desire it to be laid off in the most compact and convenient form, the said several lots or parcels of land, and all the appurtenances, to be the property of my said wife, for and during her natural life only, and immediately after her death to revert to my estate, and to fall into the general residuum and be disposed of, as is the greater portion of my estate, not specifically bequeathed and particularly enumerated; but it is hereby expressly declared that these lands bequeathed to my wife are given her in lieu of her dower in all my lands, and if not accepted as such, then the said tracts or parcels of land to fall into the residuum of my estate, as I also direct shall be done likewise with the cash bequeathed to her, which is to form part of the residuum of

my estate, and not be paid my said wife, unless she accepts the legacy of lands above described in lieu of her dower in my entire estate. The forests must not be cut down.

"4th. I direct my executors, herein after named, out of my moneys in their hands, to appropriate, for the support of my son, William H. Whitfield, semi-annually, the sum of 400, (four hundred dollars,) and also to allow the said William H. to occupy and use during his life, the tract of land known as the Lynn tract, (formerly Pearsons,) lying in Jasper county, or such other tract of equal value as my executors may deem most expedient for the said William H. to reside on.

"5th. On account of the change made in the country, in regard to the institution of slavery, by which it has become extinct, I feel constrained to decline making any bequests to any person not of my immediate family. I had by my former wills made some such bequests.

"6th. I will and direct that the entire residue of my property, of every description whatever, real, personal or mixed, including that portion which may revert from my wife, be held by my executors, and used and employed by them to the best advantage, they keeping up the farms, and converting at discretion, my unoccupied and detached lands into money, and out of the rents, interests, issues and profits of said property, to pay to Wm. H. Whitfield, my son, his semi-annual allowance of \$400, (four hundred dollars,) as hereinbefore directed, during his natural life; that out of the same fund, they make all proper provision for the proper education and support of my grand-children, living at the time of my death, or born after my death to my said son, William H. Whitfield, either by his present or any future wife he may have; and I further direct that all my grand-children shall receive the same support as is directed for those now in life, and this support shall continue from year to year until a child shall have set apart to him a part of the *corpus* of the property sufficient to support him as he should be expected to live. I direct my executors, upon the arrival at age of any of my grand-children, to take into consideration

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the annual profits and interest arising from the property herein treated of, and if the same be ample, in their opinion to pay the semi-annual allowance to the said William Whitfield, and to furnish a reasonable support to my said grand-children, or any that may be born to my said William H. Whitfield, by his present or any future wife may have, the said executors may set apart to such grand-child, such a portion of said property as they, the executors may deem proper, the same to be realty or personalty, mortgages or notes, as they may choose, and the same shall be valued by three disinterested persons, to be chosen by the executors and delivered to such child as part of his legacy or distributive share of said property, to be taken into account in the eventual division; and the executors shall have the authority to act, as each grand-child may arrive at full

7th. In the event of the death of all the legatees who take life-time-interests, under this will, I direct, in case it should occur before the arrival at age of my youngest grand-child, that the division of the entire *residuum* of my estate should take place, and that my said grand children be all made equal in the division, taking into view what each child may have before that time received. Said division to be made at the arrival at age of the youngest of my grand children, and each of said grand children is to hold his or her part in fee to him and his or her heirs forever.

8th. In the event of the death of any one or more of my grand children before their arrival at the age of twenty years, the survivors shall take such share or legacy in the exclusion of all other persons.

“9th. I direct that my executors shall not deliver any portion of my property to any of the legatees to whom the same may be devised, until the close of the year in which I may die.

(The money legacies are directed to be paid at stated times.)

“10th. I give full power and authority to my herein named executors, to exercise their discretion in the purchase of lands for my estate, and also of all necessary personal

property, for the benefit of my estate, with full authority to make all necessary repairs of houses and machinery.

"11th. I constitute and appoint my trusty friends, Leroy M. Willson, Pleasant Willson, John F. Patterson and William H. Mathis, my executors, to carry out this, my last will and testament, in witness of all which, I have hereunto set my hand and seal, this the fourth day of November, 1865.

MAT. WHITFIELD, [SEAL]."

It was regularly witnessed and probated in May, 1867.

It was read in evidence by the complainant, as was also the inventory and appraisement of the estate, shewing personal property to the value of \$11,460 62, and promissory notes and other evidences of debt belonging to testator, amounting to the sum of about \$275,468 48, including notes dated during the war, before and since. The \$11,460 62, personalty above, is included in the last named sum of \$275,468 48.

Movent read his petition and the answers.

It was admitted that Patterson and Mathis qualified, May 1867, the other two executors, some five months after. Much evidence, *pro* and *con*, was introduced, as to the management of the estate, the disagreement of the three with the fourth executor, etc. It was shewn that defendants were pecuniarily as well off now, as when they were appointed.

It is useless to report any more of the testimony.

The cause being closed, his Honor, the presiding Judge, charged the jury as follows:

1st. Where the pecuniary condition of an executor was known to the testator, and is proven to be as good as it was at the time of the execution of the will, or at the time of the testator's death, he cannot be removed for insolvency, nor required to give bond for this cause alone.

2d. It is not a ground for requiring bond of an executor, that he failed to provide liberally for the support, clothing and education of children, who are, by the will, entitled to support, clothing and education. His duty is to carry out the will of the testator, in this regard, in a manner reasonable.

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3d. Where such support, clothing and education, is directed to be provided out of the profits and interest of the estate alone, the executor cannot appropriate any part of the *corpus* of the estate to these purposes. In such cases, a court of equity affords the remedy.

4th. A refusal by one executor to deliver to a co-executor, a part of the notes of his testator, of which he alone has been possessed since the death of the testator, is not a sufficient ground to require such executor to give bond, provided such refusal has not brought loss upon the estate.

5th. Where, by his will, a testator directs executors to keep up his farms, having, at the time of his death, a large number of farms, two only of which he was then cultivating, and one of these two, at the time of making the will, it is proven, was cultivated by from twenty-five to thirty hands, and at his death, by only five laborers, equal to three good hands, and leaving the other to his widow during her life, with stock, provisions and implements of husbandry, and giving no directions as to the proceeds of the first described farm, and making distinct provisions for the support of his only child, a son, by an annuity, and of the children of that son, from other specific sources, and when the will gives power to advance as part of his legacy to a grand child, upon his arriving at age, any real estate of the testator on account of his legacy, it is no breach of duty on the part of the executor to deliver to such grand child, upon his application, this small farm, as a part of his legacy.

6th. That when two of four executors qualify soon after testator's death, and one of these has the sole possession of the notes of the estate, and is performing alone, the duties of executor, and four months after, the remaining two executors qualify, and do not perform any act as executors for seven months, it is not a ground for removal or requirement of bond, of such last named two executors, that they have performed no act, unless their failure to act amounts to gross negligence, whereby loss has resulted to the estate, in which event they would be properly chargeable with the conduct of their co-executor, and responsible for his mismanagement.

7th. It is the duty of an executor to pay the debts of his testator and the specific legacies named in the will, and to provide the twelve months' support for the widow or family before paying to a residuary legatee his full share of the residuum, and it is not mismanagement in the executor to refuse to pay such share.

8th. Where it appears from the evidence that an executor, for the purpose of securing the payment of a note belonging to the estate, places it in the hands of attorneys at law of good standing, with instructions to proceed to secure the same, reasonable diligence is exercised.

9th. A will is the legal declaration of a man's intention to the disposition of his property after his death. This will is to be executed by one nominated therein. Such a one is called an executor. This one, on being qualified, is appointed executor, and he is sworn to execute the will of his testator. That will, if it does not contravene the law, is the law of his administration; it is the rule of his conduct. The law imposes upon him the duty, first, of paying debts; second, of specific or special legacies; third, residuary legacies; fourth, to hold any residue undivided to the next of kin.

10th. The cardinal rule is to carry out the intention of the testator, as expressed in his will, in good faith, and with that prudence and diligence as to his duties, as should characterize the conduct of men of ordinary prudence and care.

11th. Each executor is responsible for his own act only, unless by his own act or gross negligence, he has enabled or permitted his co-executor to waste the estate.

12th. The law is, an executor is not required to give bond; but upon complaint that he is mismanaging the estate, or is about to remove, he may be required to give security.

13th. There must be, then, mismanagement on the part of the executor, to impose the condition of security upon him.

14th. From an examination, I charge you that the insolvency alone of executors is not a sufficient reason to require that he or they should give bond.

15th. If an executor is insolvent, a special jury might be constituted, on slighter proof or evidence of mismanagement, in

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requiring security, than if the executor was unquestionably solvent; but, if a testator chooses to repose confidence in an executor who is insolvent, whatever may be the basis of that confidence, so long as such executor faithfully executes the trust confided to him, so long no power can compel him to give security.

16th. If several executors are named in the will, one or more qualifying, shall be entitled to execute all the trust confided to all, unless specially prohibited. If more than one qualifies, each is authorized to discharge the usual functions of an executor, but all must join in executing a special trust, and I refer you to the will to ascertain whether it contains a special trust.

17th. As I before said, the cardinal rule is, for the executor to execute, in good faith, the will. They are, though four in number, recognized as but one, in law, and each is privileged to exercise the duties of his appointment, unless prohibited in the will.

18th. Mismanagement may consist, either in negligence to discharge duty, or in failing or refusing to execute the will.

19th. It is the duty of co-executors to act in harmony in executing the will, and, of course, is indispensable where the operation of all is essential to the execution of his trust. But the possession of assets by one executor to the exclusion of others, if not prohibited by the will, may not, and does not, amount to mismanagement, unless it jeopardizes or puts in hazard the interest of the estate.

20th. If differences and disputes about the assets between the executors results in loss to the estate, then this may be such mismanagement as would justify you in requiring them to give bond and security.

21st. Mismanagement may be defined to be negligence or malpractice in taking care of the estate and executing the will, in waste of the estate, or any part, or failing to take due care of the support and education of minors whom he is intrusted with.

22d. A simple omission to join in the active administration, is not mismanagement, unless the omission amounts to

negligence, whereby loss or waste is permitted. For
or trivial causes, executors ought not give bond.

d. If, by the act of Patterson, the estate has suffered
or been put in jeopardy, this is mismanagement by Pat-

l. If the Willsons consented to or permitted such act,
are, also, guilty of mismanagement.

e jury returned a verdict in favor of complainants,
ing the defendants to give bond and security: where-
counsel for defendants moved a new trial in the said
on the following grounds:

. Because the jury found contrary to the charge of the

That the jury found contrary to the charge of the
and the evidence, there not being proof sufficient of
or mismanagement of the estate to authorize such
ing.

. Because the verdict was strongly and decidedly against
weight of the evidence.

l. Because the verdict was strongly and decidedly against
weight of the evidence and the charge of the Court.

l. Because the verdict was contrary to evidence and the
principles of justice and equity.

l. Because there was no evidence going to show that
M. Willson and Pleasant Willson, two of the execu-
had anything whatever to do with the assets of the
; or that they acted in concert with Patterson, or that
performed any act as executors, or that by their failure
t, they had injured the estate.

l. That there was no evidence that Mathis, one of the
itors, was prevented by other of the respondents from
forming any act as executor, except so far as the refusal of
erson, one of the respondents, to turn over to him, the
Mathis, a part of the promissory notes belonging to the
e, goes.

h. Because the verdict was contrary to law, evidence, and
charge of the Court.

th. Because the Court erred in charging the jury as to
ial trusts, requiring the joint action of all executors,

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without instructing them as to what constitutes a special trust but referring them to the will, to ascertain whether it contained a special trust.

The Court refused the new trial, and this is assigned error on the grounds aforesaid.

J. HILL, A. REESE, JORDAN, FOSTER, for plaintiffs in error.

W. A. LOFTON, B. H. HILL, for defendants in error.

WARNER, J.

This was a proceeding originally instituted in the Court Ordinary of Jasper county, to require three of the executors appointed by the last will and testament of Matthew Whitfield, deceased, to give bond and security, as required by the 2411th section of the Code, upon the ground that said executors were mismanaging the estate. An appeal was taken from the Court of Ordinary to the Superior Court, and upon the trial of the appeal, the jury found a verdict requiring the executors to give security. A motion was made for a new trial in the Court below, upon the several grounds specified in the record, which motion was overruled by the Court. The refusal of the Court to grant the new trial is now assigned for error here.

It appears from the record that Matthew Whitfield, the decedent, died possessed of a large estate, consisting of real and personal property, and chose in action, leaving a will by which he appointed his *trusty* friends, Leroy M. Willson, Pleasant Willson, John F. Patterson and William H. Mathis his executors, all of whom qualified as executors. What are the rights and duties of executors, as between themselves (where there are more than one,) as declared by the Code, regard to the management of the estate? "If several executors are named in the will, one or more qualifying, shall be entitled to execute *all the trusts* confided to *all*, unless *specifically prohibited by the will*; if more than one qualifies, *each* is authorized to discharge the usual functions of an execut

must join in executing *special* trusts. Each executor is responsible for his own acts *only*, unless, by his own act, or negligence, he has enabled or permitted his co-executors to do the same. "Revised Code, section 2413. There is no prohibition in this will as to the acts of *any one* or *any* of the executors named therein. By the common law, all executors, however numerous, were regarded, in the eye of the law, as an *individual person*, and the acts of any one of them, in respect of the administration of the effects, were deemed to be the acts of *all*, they all having a joint and several authority over the whole property. 2 Williams on Executors, 620. Toller's Law of Executors, 358.

The ground of mismanagement relied on is, that the executor, shortly after his death, turned over to the person, one of the executors, a large amount of promissory notes, and other evidences of debt, which he has continued to hold, with the consent and approbation of two of the other executors, against the wishes and *protestation* of the other executor. This is no evidence of mismanagement of the estate. Each executor is responsible for his own acts, and Mr. Mathis is no part of Whitfield's estate. The insolvency of executors is not *per se* a sufficient ground to require security, the more especially when it appears that the pecuniary condition is quite as good *now* as it was at the time of their appointment by the testator.

We think the Court erred in its charge to the jury "that where more than one qualifies, each is authorized to discharge the functions of an executor, but all must join in executing a special trust, and I refer you to the will to ascertain whether it contains a special trust." Whether the will contained any trusts which required the *joint* action of all the executors, was a question of *law* for the Court to decide, and the question of *fact* to be referred to the jury for their determination.

In looking through the evidence in this record touching the question of mismanagement of the estate by the executors so as to require them to give security, we think that the verdict

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of the jury was strongly and decidedly against the weight of the evidence, and that the Court below erred in not granting a new trial upon that ground.

Let the judgment of the Court below be reversed.

JOSEPH R. HIGH, plaintiff in error, vs. JAMES McHUGH, defendant in error.

1. Under the Scaling Ordinance of 1865, the parties to contracts made between 1st June, 1861, and 1st June, 1865, have the right to give to the jury the consideration of the contract, and the value thereof, *at any time*; and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency *at any time*, and the verdict and judgment rendered shall be on principles of equity.
2. The evidence in this case having been fairly submitted to the jury in accordance with the Ordinance, and there being sufficient evidence to support the verdict, and the presiding Judge being satisfied with the same, this Court will not set it aside.

Scaling Ordinance. Motion for new trial. Decided by Judge ROBINSON. Morgan Superior Court. September Term 1868.

High sued McHugh upon a promissory note for \$1093 dated 3d of March, 1863, and due the 25th of December then next. McHugh plead that the note was given for the purpose that it was to have been discharged in Confederate currency, and that when the note fell due, he tendered High's agent Confederate currency in payment, and it was refused, and that he continued to hold the same till it was worthless. The trial resulted in a verdict for High for \$109 39 in gold, (without interest,) or equivalent in greenbacks, when paid. High moved for a new trial upon several grounds, all resolvable into this: that the verdict was too small under the evidence. The Judge refused a new trial, and of that refusal complaint is made here. For so much of the testimony as is necessary to understand the cause, see the opinion of the Court.

BROWN, C. J.

1. This contract was made between the first June, 1861, and the first June, 1865, and is, therefore, embraced in the provisions of the Scaling Ordinance, passed by the Convention of 1865. That Ordinance authorizes the parties to give in evidence to the jury on the trial, the consideration of the contract, and the value thereof, *at any time*, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency *at any time*, and leaves the jury to find a verdict, and makes it the duty of the Court to render a judgment, "on principles of equity," between the parties.

This Ordinance has been sustained by this Court as constitutional, and has been enforced in a number of cases. See *Baughter et al. vs. Culpepper et al.*, 25 Ga., 26. *Erans vs. Falker*, 35 Ga., 117. *Taylor et al. vs. Flint et al.*, 35 Ga., 124. *Merry vs. Walker*, 36 Ga., 327. *Field, Adm'r, vs. Leak*, 36 Ga., 362. *Oliver & Wooten vs. Coleman*, 36 Ga., 552. In several of these cases the Court holds that "more than ordinary discretion" is delegated to jurors by the Ordinance. In the case last cited, it is said with emphasis that jurors should be allowed a "*liberal discretion*" under it.

Apply these rules to this case, and we see no sufficient reason for disturbing this verdict. There was evidence to support the finding, and it was the province of the jury to consider the evidence when in conflict, and determine what part of it was entitled to most weight.

2. At the time the note was made the evidence shows that one dollar in gold was worth three and a fraction in Confederate currency. When due, one dollar in gold was worth twenty-one in the same currency. The value of the land is differently estimated in the evidence, and no very definite conclusion as to its value at the time of the trade, or the time the note was made, can be arrived at by an examination of the testimony. The verdict seems to have been predicated upon neither the value of gold in Confederate currency, when the contract was made, nor when the note was due, but the jury estimated

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the currency at about ten for one. If the verdict was intended as a compromise between the value of the two per the advantage upon that basis is given in favor of the plaintiff. It is objected that no interest is allowed the plaintiff. We can not so determine from the record. The evidence shows that the sale was to have been for cash when agreed upon. But as the defendant had not enough of current money to pay the full amount when the trade was closed, Mr. E. received what he had, and took this note, giving time on balance. As the note does not bear interest till due, the position is that the interest was estimated and put in the principal of the note as principal, or was waived. After carefully considering this case, and taking into consideration the facts, the Judge before whom it was tried, was satisfied with the verdict, we are not prepared to say that it is so strongly decided against the weight of evidence as to justify setting it aside and granting a new trial.

Judgment affirmed.

O. A. LOCHRANE, plaintiff in error, vs. WM. SOLOMON, defendant in error.

L., who owed S. \$1,000, for which S. held L.'s note and mortgage on a printing press, sold the press to C. for \$5,000, and C. agreed to pay \$1,000 to S. and satisfy the note and mortgage, but S. refused to release L. and take C. for the debt. There was evidence before the jury, however, that S. agreed to take C. as collateral, and afterwards agreed to give C. time on the \$1,000, which he was to pay for L., if he would give him two and a half *per cent.* per month for the indulgence, which he did for three or four months:

1. *Held*, That it was error in the Court, in his charge to the jury, to restrict them to the single inquiry whether C. was substituted as a debtor in place of L.
2. If C. agreed to pay the debt of L. to S. in a short time, and S. had accepted the liability of C. as collateral, *afterwards* for a valuable consideration, extended the time of payment for three or four months as he had the right to do at his own risk, L. could not sue C. at that time, and S. was liable to L. for any damage sustained by L. on account of such indulgence given by S. to C.

Lochrane vs. Solomon.

Motion for new trial. Decided by Judge COLE. Bibb Superior Court. November Term, 1867.

Solomon brought complaint on a promissory note against Lochrane. The plea was the general issue. On the trial, Solomon read in evidence his note, and closed. It was made in Atlanta, 6th of October, 1858, by Lochrane to Solomon, or bearer, for \$1,000 00, payable sixty days after its date, at the agency of The Georgia Railroad Bank, in said city.

The defendant read in evidence the answers of R. A. Crawford to interrogatories, stating substantially as follows: In 1860, he, as trustee, bought of Solomon "The Empire State" newspaper office at Griffin, Georgia, subject to a mortgage for \$1,000 00 in favor of Solomon. It was part of the contract of purchase that he should pay the mortgage, and he believed Solomon so understood it. He agreed with Solomon to continue the mortgage, and paid him interest thereon at the rate of two and a half *per cent.* per month for three or four months. He had a conversation with Solomon at the time of Solomon's granting him indulgence on the mortgage. Solomon said Lochrane wished the matter closed, and had instructed him to close the mortgage. The office was destroyed by fire three or four months after said conversation. It was worth \$5,000 00 or more. Solomon knew of his purchase from Lochrane soon after it was made, for Solomon soon came to arrange about the mortgage debt, and did arrange it by Crawford's agreeing to pay the two and a half *per cent.* per month. The defendant here closed.

Thereupon, the attorney for Solomon, read the answers of Solomon to interrogatories. His version of the matter was this: Said note was for \$1,000 00 loaned to Lochrane on the 6th of October, 1858, and was secured by a mortgage on the press, type and *paraphernalia* of a printing office in Griffin, known as "The Empire State office." Lochrane neither ordered him to foreclose the mortgage before said fire, nor did he request him to do so. Lochrane and Crawford had an interview with him in Atlanta for the purpose of trying to

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change said note and mortgage and substitute said Crawford with Alfred Iverson, of Columbus, Georgia, as endorser. Solomon refused to make any change in the obligation whatever, stating that he did not believe Crawford and Iverson were good. He did not recollect the precise date of this, but knew that it was about the time of said sale by Lochrane to Crawford. Crawford paid Solomon between \$40 00 and \$50 00 as interest, agreed on between Solomon and Lochrane, and no more was ever paid. Lochrane agreed to pay to Solomon two and a half *per cent.* per month on said loan, but requested Solomon to release him and take Crawford in place of him as to said interest. Solomon refused, saying it made no difference to him who paid it, so that he got it. After some time, when Solomon would dun Lochrane on the notes, Lochrane would say that he should have foreclosed the mortgage and Solomon would reply that he had no notice to do so.

The defendant also testified in his own behalf, as follows: He borrowed the \$1000 00, and gave the mortgage as aforesaid; that his agreement as to the interest was to pay two and a half *per cent.* per month for the sixty days, which was deducted out of the face of the note. The terms of the sale of "The Empire State" office to Crawford included an agreement to pay said note; the only money in the trade was to go to Solomon for said note.

When Lochrane went to Atlanta and met Crawford to close the trade and have the mortgage taken up, he found that Crawford, instead of having the money, had a note, with Alfred Iverson's endorsement. Solomon refused to take it and cancel the mortgage. Thereupon, Crawford stated that he would have the money in a short time from the sale of the slave in Talbotton, and Lochrane consented that the mortgage should stand *in statu quo*, and give Crawford time to get the money. Lochrane had no interest in asking Solomon to let Crawford pay the *per cent.* in Lochrane's place, and made no such request. Crawford bought subject to the mortgage, and agreed to take it up, and he, and not Lochrane, arranged with Solomon. But Lochrane being present did not object to such indulgence to Crawford, but cons

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it; but the indulgence was to be only for the short time for the purpose aforesaid. Afterwards, Lochrane found out that Crawford had not yet paid the mortgage, and that Solomon had arranged with him to continue the mortgage debt at said monthly *per cent*. This arrangement was without Lochrane's consent, for Solomon knew that Lochrane wished the debt paid. Lochrane then went to Atlanta, and notified Solomon that he must foreclose the mortgage, that he would not consent for the matter to stand longer; this notice, as he recollected, was given time enough for the collection before the fire.

What the Court charged does not appear, except as stated in the motion for a new trial. The verdict was for Solomon. Thereupon, Lochrane moved for a new trial upon the grounds that the verdict was contrary to the evidence, and that the Court erred in charging the jury, that unless they believed, from the evidence, that the plaintiff had assented to the agreement made between Lochrane and Crawford, and had agreed to substitute Crawford for Lochrane, as his payee, then the notice given by Lochrane to foreclose his mortgage availed him nothing, and the jury should find for the plaintiff. The Court refused a new trial, and this is assigned as error.

COBB & JACKSON, R. CLARK and R. F. LYON, for plaintiff in error.

W. POE for defendant in error.

BROWN, C. J.

1. The charge of the Court, in this case, confined the jury to the single inquiry whether Crawford was substituted for Lochrane as the debtor of Solomon. We think this was error. There was positive evidence that Solomon agreed to the Crawford's liability as collateral security; and it was the duty of the Court to have permitted the jury to consider that evidence, in connection with the evidence in reference to the substitution; and to inquire whether Solomon so

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used this collateral security as to work injury to Lochrane; and if so, what damage resulted, by such act of Solomon, to Lochrane.

2. *In 23d Ga. Reps.*, 181, it is ruled that the holder of collaterals is bound to due diligence, and if anything is lost by the want of it, he is to be the loser.

In 4th Ga., 442, and *18th Ga.*, 655, this Court held, that collaterals placed in the hands of a creditor are not the subject of garnishment. Apply these rules to this case, and what is the result? If, as the evidence of Crawford shewed Solomon accepted his liability as collateral, for the payment of Lochrane's debt, no other creditor of Lochrane could have compelled Crawford, by process of garnishment, to pay the debt which he owed to Lochrane, and which Solomon had accepted as collateral, to any other creditor of Lochrane till Solomon was paid. And Solomon, having given time to Crawford, in consideration of two and a half *per cent.* per month, and Crawford having paid him a valuable consideration for the indulgence, Lochrane could not have maintained an action against Crawford upon the liability which Solomon held as collateral, during the period for which Crawford had paid Solomon for indulgence. And it necessarily follows under the ruling of this Court, in the case cited in *23d Ga.* that Solomon, who, instead of exercising due diligence to collect the money out of Crawford, gave him indulgence for a valuable consideration, is liable, if loss accrued to Lochrane by reason of such indulgence. We are aware that the evidence is in conflict, but as Crawford's testimony sustains this view of the case, the Court should not have withdrawn from the jury the consideration of this evidence, and of the question as to the damage sustained by Lochrane on account of the extension of time of payment given by Solomon to Crawford.

If the mortgage had been foreclosed by Solomon, and levied upon the printing press in the hands of Crawford without the indulgence for which Solomon received the two and a half *per cent.* per month, most probably the money would have been made out of the press before it was c

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sumed by fire; and the Court should have permitted the jury to consider whether Lochrane sustained damage by this delay.

It is insisted in argument, that the verdict should not be disturbed, because Lochrane did not ask the Court below to give this view in charge to the jury. The charge, as given, entirely excluded this branch of the case from the consideration of the jury. The charge was plain and positive, and Lochrane might well suppose the Court would refuse to give in charge a proposition in the teeth of the charge already given. If the charge, when applied to the evidence in the case, was erroneous, as we hold it was, the fact that Lochrane did not ask the Court to give a charge in contradiction of what he had already charged, can not be a sufficient reason why the error should not be corrected.

Judgment reversed.

McCAY, J., concurred, but wrote out no opinion.

WARNER, J., dissenting.

From the facts in this case, as exhibited by the record, Lochrane was the maker of the note sued on, the principal debtor to Solomon, the plaintiff, and not a *surety*. It was his debt, and he is bound, under the law, to pay it, unless he is discharged from such payment *by law*. On what ground does he seek to be discharged from the payment of *his own debt* to Solomon? Simply on the ground that he had bargained the property which he had mortgaged to Solomon, to secure the payment of the debt to Crawford, and had given Crawford time to raise the money to pay off the mortgage debt of \$1,000 00. There is no evidence in the record that Solomon agreed to *substitute* Crawford as *his* debtor, for the \$1,000 00, in the place and stead of Lochrane. All that can be said is, that Crawford paid Solomon two and a half per cent. a month not to foreclose his mortgage on *Lochrane's property*, in payment of *Lochrane's debt*. But it is said, that this payment by Crawford to Solomon of two and a half per cent. a month, for three or four months, not to foreclose his

mortgage on Lochrane's property, in payment of Lochrane's debt, was a *collateral*. Collateral to what? There is no evidence that Solomon agreed to accept Crawford, either collaterally or otherwise, as *paymaster* for Lochrane's debt. Upon what *legal* principle, then, can Crawford, or Crawford's act, be said to be a *collateral* undertaking to pay Lochrane's debt to Solomon, without the consent of Solomon? Collateral security in contracts, is a *separate* obligation, which is attached to another contract, and is to guarantee its performance. By this term, is also meant the transfer of property, or of other contracts, to insure the performance of a *principal engagement*. 1st. Bouvier's Law Dictionary, 275. What *collateral* security did Solomon take from Crawford, to secure Lochrane's debt? What has become of *that collateral security*, if any such ever existed? How, or in what manner, has the owner of *that collateral security* been injured by the act of Solomon? The simple truth is, (taking the most favorable view of this case for the defendant,) that Crawford paid Solomon two and a half per cent. a month for three or four months not to *foreclose* his mortgage on *Lochrane's property*, and thereby collect the debt that Lochrane owed him. *That is all of it*; there is no *surety*, or *collateral*, or *collateral security* in the case, who has been *injured*. The *assumed collateral* is a mere man of *straw*. In my judgment, there was no error in the Court below in overruling the motion for a new trial, on the ground that the verdict was contrary to the evidence. The Court was not requested, in writing, to charge the jury upon any part of the evidence, and there is no exception taken, that the charge of the Judge did not cover *all the facts proved*. The charge of the Court excepted to, was not error, in view of the facts contained in the record. The defendant was the *principal debtor*, and not a *surety*, or *collateral surety*, and has lost no *collateral security*. The loss of which he complains, (the destruction of the printing-press by fire,) did not spring out of, or result from, any agreement made between Crawford and Solomon, which would operate as a *legal discharge* of the debt, but from a cause entirely independent of that alleged agreement. From the facts dis

closed by the record, and my understanding of the law applicable thereto, I am of the opinion the judgment of the Court below should be affirmed.

JAMES MARTIN *et al.*, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

The bill of exceptions in this case was a general one, that the jury found contrary to law and evidence:

Held, That there was not sufficient legal evidence to sustain the verdict.

Burglary. Motion for new trial. Decided by Judge WORRILL. Muscogee Superior Court. May Term, 1868.

James Martin and Paul Key, two negroes, were indicted for breaking and entering the store-house of James Bradford, in March, 1868, in the night time, with intent to steal therefrom, etc. They were tried and found guilty, with a recommendation, by the jury, that they be imprisoned in the penitentiary for life. Their attorney moved for a new trial, upon the ground that said verdict was contrary to law, and not warranted by the testimony. The motion was overruled, and the prisoners were sentenced to hard labor in the penitentiary for and during their natural lives. Thereupon, a writ of error was sued out, upon the ground that the Court erred in refusing a new trial.

The evidence showed that the store-house was broken, as charged. The hinges of the window were broken off with an axe. The money-drawer, containing three dollars and a half, was moved from its place.

The question was, who did this wrong? The evidence to show that the defendants were the perpetrators was as follows: The owner of the store-house testified, that he saw Martin at his store-house, just before he closed it, on the evening of the burglary. Americus McDonald, a negro, testified, that he found out next morning that said burglary had

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been committed ; that between eight and nine o'clock, on the night of the breaking, he passed by the store-house, and saw Martin and a white boy sitting on a bench, in front of it. The owner was counting his money. The witness asked Martin what he was doing there at that time of the night. About an hour later, witness passed them again, and saw the white boy on said bench, and, as he passed the gate, he looked in at a hole and saw Martin in the back yard of the store-house.

Fanny Bell, a negro, testified, that at the time of the burglary she lived on an alley back of "The Muscogee Home;" that about half after twelve o'clock that night, she saw Martin at said store-house ; that about fifteen minutes before that, Paul Key and Martin came to her house, and told a negro, named Sarah, not to go into the street that night, because the Marshal was waiting for her ; that in a little while she, witness, went out into the street to look for the Marshal, and saw no one.

Robert Wood testified, that about midnight, on said night, he went to the house of Jim McHenry, because of a family quarrel there, and there saw Martin ; that he went to the corner of "The Muscogee Home," and there saw Paul Key ; that about two o'clock, he came to Gunby's old corner, (the moon was shining brightly,) looked towards Tim Markham's, and saw some one sitting on the platform in front of the store ; that he walked down, and when opposite to him, rose up and gave a signal ; that, at that moment, he looked towards the said store-house, and saw a man coming from the corner, running ; the man moved rather in a circle, and went to the door of "The Muscogee Home;" witness went to him ; he had his hat down over his face ; witness said, "Jim, what are you doing here?" He said he "was waiting for a gal." All the while witness was looking towards said store-house, and saw some one leave said bench or watermelon stand, and go across the street ; witness headed him off ; it was Paul Key ; shortly afterwards witness noticed that said window was open ; went to the window, put his hand in at it, and found a money-drawer ; it occurred to him that Mar-

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and Key were the guilty parties; witness started immediately, and as he did, Martin left "The Muscogee Home," they left the corner at Dr. Grimes's; he started after them; ran, and got together at Gunby's corner; he pursued into an alley and lost them; about an hour later he found Martin, and about two hours later, he arrested Key; searched them carefully, and found in Martin's pocket a loaded knife open; he found nothing on Key.

His testimony for the defence was as follows: Said Martin admitted being at McHenry's, and seeing Wood at "The Muscogee Home," and saying to him that he was "waiting for him;" he said he did not see Key break into the store-

Key testified that he knew nothing of Martin's break into said store-house, and knew that Martin did not go into it.

Phine Harris, a negress, testified that she was the girl from whom Martin was waiting, that she came with him to "The Muscogee Home," and went up stairs to see a man.

SEY & RAMSEY, (by JAS. RUSSEL,) for plaintiff in

THORNTON, Solicitor General, for the State.

OWN, C. J.

Putting ourselves in the position of jurors trying this case, and applying the known rules of law to the evidence given at the trial, we are not satisfied that the guilt of the defendants has been legally established. The rule of law, as we understand it, is, that the facts established by the evidence must not only be consistent with the hypothesis of the defendant's guilt, but must exclude every other reasonable hypothesis. In a case involving life, or penitentiary imprisonment for life, this rule should not be relaxed.

Applying the legal rule to the case of Paul Key, and we are unable to see how this verdict could stand for a moment. It is difficult to reconcile the evidence as to this defendant

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with the hypothesis of guilt, while there may be many other reasonable hypotheses not excluded by it.

The proof against Martin is consistent with the hypothesis of his guilt, but not inconsistent with other reasonable hypotheses. He was seen more than once that night at the house where the burglary was committed by some one, and was in the back lot of the store, if the witness is not mistaken. This raises a strong presumption of guilt, when taken in connection with the fact that he ran when pursued by the policeman. But to rebut this presumption, we have his statement made at the moment, without time for meditation, that he was there waiting, as he said, for a "gal." It is in proof that the "Muscogee Home," a house where young men slept, was near by, and Josephine Harris swears that she was the girl Martin was waiting for, and that she went with him to the "Muscogee Home," and went up stairs to see a man. He may have been engaged to carry her and others to that house for the same purpose, and this may have been the reason why he pulled his hat over his face, and did not wish to be seen and recognized by the policeman, and the reason why he ran when pursued. Such a hypothesis is not an unreasonable one, when taken in connection with the further fact that no money was found upon his person when he was arrested. Again, the policeman swears that he put his hand into the window of the store-room, and felt the money drawer, and that the pursuit commenced immediately afterwards. He does not pretend that he removed the drawer out of the house, while the owner swears he found it in the yard next morning. From this, it appears that some one besides Martin handled the drawer that night.

It was a very public place in the city of Columbus; and the proof shows that there were a number of persons about the store-house, and the "Muscogee Home," and McHenry's house near by, where there was a family difficulty to settle, which required the aid of a policeman after midnight.

Looking through this evidence, who can say that his mind is satisfied beyond a reasonable doubt, that Martin and Key committed the burglary? May it not have been done by other

ns about the premises the same night? We are not satisfied that it was not. The evidence was not sufficient to bring the mind to a ready conclusion of the guilt of the defend-

We think the following evidence of Mr. Wood, the police-officer, was illegal, and should not have gone to the jury: He went to the store-window, and put his hand in the drawer, and found the money-drawer. It occurred to him in a moment that Jim Martin and Paul Key were the guilty parties; started immediately, etc. This statement was allowed to have an undue weight with the jury, when it was only a mere conjecture of the witness, growing out of the fact that he had seen them both near the store. If he had been expected to have seen two others of the numerous persons who were about the store-house that night, most probably it would have occurred to him that they were the guilty parties. The witness should have stated the facts, and this conjecture should have been withheld. Upon the whole, we are satisfied that a new trial should have been granted. Judgment reversed.

STIEL HARRIS, plaintiff in error, vs. J. B. BREED & Co.,
defendants in error.

Where the Court below ordered a garnishee to perfect an answer to which exceptions had been filed, and the garnishee neglected to answer until the garnishment was called, on the motion docket, at the next term after the order had been passed, and even then, though present in court, insisted on leave to answer at an adjourned term, which the court had determined to hold, and the Court permitted the plaintiff to recover a judgment against the garnishee:

That this Court will not control the discretion of the Judge below, in refusing, at the adjourned term, to set aside the judgment, and permit the garnishee to answer.

Garnishment. Motion to set aside judgment. Decided by Judge WORRILL. Muscogee Superior Court. February,

J. B. Breed & Co. sued Ritter & Porter, and *pendents* had summons of garnishment served on Daniel Harris, the 16th of February, 1867. He answered at the first term but the Court, for some cause not stated, required him to answer over. On the 22d of November, 1867, having no judgment against Ritter & Porter, and Harris having failed to answer over, they entered up judgment against Harris. The Court adjourned over from the 22d of November, 1867, till February, 1868.

On the 21st of February, 1868, Harris moved to set aside the judgment against himself, in order to allow him to answer said summons. The reasons urged by him in support of his motion were these: He was instructed by his counsel, when he appeared to file his answer thereto, at the opening of the session of said November term, to appear on some other day, before the final adjournment of the Court for that term, and file it, as it would do as well on any other day during the term. As there was much business in the Court, he was advised that it would not adjourn in at least a week later than it did, and that, at divers other times, he attended the Court during said November session, for the purpose of answering said summons, but, at all such times finding his counsel engaged and the Court occupied with other business, he could not do so. He was always ready to answer in terms of the law. The Court adjourned in November until February, 1868, unexpectedly to both himself and his counsel, and because of this adjournment, he failed to make said answer. The cause on the motion docket was not called till a few minutes before said adjournment, and neither he nor his counsel had been forewarned of said adjournment. They were taken by surprise, and objected, at the time, to a judgment being entered against Harris, insisting to be allowed to make said answer during the term at said February session in 1868, which objection the Court then overruled, and allowed the judgment entered.

The statements seem to have been admitted, but the Court refused to set aside the judgment, and this is assigned as error.

C. R. RUSSELL, THORNTON, for plaintiff in error, cited *Ga. R.*, 650; Code, secs. 3228, 3485; 15 *Ga. R.*, 186; 30 *R.*, 923. Drake on Attachments, 658.

L. T. DOWNING, (represented by GEO. S. THOMAS,) cited *Min's Code*, secs. 3228, 3485, 3530, and Drake on Attachments, 658, E.

McCAY, J.

Whilst it is, as a general rule, true, that during the term, judgments of a Court "are in its own breast," and, for good reasons, be vacated; yet, it must be a strong inducement to induce this Court to interfere with that discretion must necessarily be lodged with the Judge in such matters. This is only a Court for the correction of ERRORS IN JUDGMENT, and there must be an abuse of the discretion of the Court below to make his action error of law. This party appeared his day in Court fairly. If he neglected his duty; if he failed, without good reason, to answer by the time of the opening of the case, he was in *laches*. Had he, even then, proceeded to answer, the Court probably would have heard him; but as he, instead of answering, set up a *right* to answer at the next adjourned term, and the Judge has seen fit not to come to his aid, and undo its proceedings for his accommodation, it is as in that we do not think the Court has abused its discretion, we affirm its judgment.

Brian, ex'r, et al., vs. Banks.

MOSES BRIAN, executor, et al., plaintiffs in error, vs. M^{rs} B. BANKS, defendant in error.

The Act of the Legislature of 1861, and the Ordinance of the Convention of 1865, *suspending* the running of the Statute of Limitations State, are recognized, and made valid by the *express* provisions Constitution of 1868.

1. An indorsement of a promissory note past due, for a valuable consideration, is a new contract, and the Statute of Limitations be run in favor of the indorser only from the date of the indorsement. BROWN, C. J.
2. The Statute of Limitations was legally suspended for one year by the Act of December, 1860. BROWN, C. J.
3. The Ordinance of the Convention, passed 1st November, 1861, declaring the Statute of Limitations, in all cases, civil and criminal, *and to have been* suspended from the 19th of January, 1861, and shall so continue until civil government is fully restored, or until the Legislature shall otherwise direct, has been legalized by the new Constitution, and the Ordinance of the Convention of 1868, so far as it does not divest vested rights. This made it valid, so far as prospective, but whether it could restore to plaintiff a right of action lost by the running of the statute for the *full period* prescribed before it passed, *quere*. BROWN, C. J.

Complaint. Statute of Limitations. Decided by HUTCHINS. Hall Superior Court. September Term,

This was complaint in favor of Martha B. Banks, against Moses Brian, as executor of N. K. Wright, deceased, and Abram Atkins, as endorser on two promissory notes, payable to Atkins or bearer, one dated the 29th of July, 1857, the other dated the 20th of October, 1857, each due on or after its date, and each indorsed by Atkins on the 2d of January, 1859, and the 11th of July, 1860, respectively.

The executor plead that no notice of the debt had been given to him, *plene administravit preter*, and the statute of limitations. The endorser plead *non assumpsit*, payment of the statute of limitations, and that, by indulgence of the maker, by the holder, he was discharged.

Whether any evidence was introduced, does not appear. The defendant's attorney confessed a judgment for the full amount of the notes. It is stated that upon the hearing

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the court ruled that the statute of limitations was suspended from the 14th of December, 1861, until the 1st of June, 1865, and that time was not to be computed against the plaintiff, and that the Act of the 14th of December, 1861, to suspend the statute of limitations, was of force till the end of the war.

This decision is assigned as error. (This cause was held so because the same was under the military order.)

E. M. JOHNSON, J. M. DORSEY, for plaintiffs in error.

JOHN GRAY, (represented by L. E. BLECKLEY,) for defendants in error.

WARNER, J.

The error assigned to the judgment of the Court below in this case, is the ruling and deciding that the statute of limitations in this State did not run against the plaintiff's demands during the war, and that his right of action thereon was not barred. The plaintiff's action was instituted on the 14th February, 1866, to recover the amount due on two promissory notes against the maker and indorser, one of which was dated 20th October, 1857, due one day after date, and endorsed on the 11th July, 1860. The other note was dated 29th July, 1858, due one day after date, and indorsed on the 26th January, 1859. The defendants plead the statute of limitations in bar of the plaintiff's right to recover. The argument for the plaintiff in error is, that the statute having commenced to run, it was not suspended by the Act of 1861, because that Act was passed by an *illegal* Legislature. This argument, if true, proves too much for the defendants in the Court below, now plaintiff in error here. If there were no *legal legislatures* during the war, then there were no *legal courts*, in which the plaintiff below could have sued upon the notes. It is the judgment of a majority of this Court, inasmuch as the Statute of 1860 suspended the running of the statute of limitations for one year, and the Act of 1861 suspended the running of the statute during the war,

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and the ordinance of the Convention, on the first day of November, 1865, having declared the statute of limitations to be, and to have been, suspended, from the 19th of January, 1861, and that, inasmuch as the 3d paragraph of the 11th article of the Constitution of 1868 declares of force "Acts passed by any legislative body sitting in this State as such, since the 19th day of January, 1861," (including Irwin's Code), and that inasmuch as the 5th paragraph of the 11th article of the Constitution of 1868 declares that "all rights, privileges, and immunities, which may have vested in, or *accrued* to, any person or persons, or corporation, in his, her, or their own right, or in any fiduciary capacity, under any Act of any legislative body, sitting in this State as such, since the 19th day of January, 1861, shall be held *inviolable* by all the courts of this State, and shall not be attacked for fraud, or unless otherwise declared invalid by this Constitution;" that the plaintiff's right to recover upon the notes sued on is not barred by the statute of limitations; that the Act of 1861, as well as the Ordinance of 1865, suspending the running of the statute, are recognized and made valid by the *express* provisions of the Constitution of 1868; that "all rights, privileges, and immunities, which may have vested in, or *accrued* to any person, in his, her, or their own right," as specified in the 5th paragraph of the 11th article of the Constitution of 1868, includes the right of *the plaintiff* as well as the rights of *the defendant*, whether the same may be, and not the rights of the defendant *exclusively*.

Whatever may be said in regard to a *prescriptive* right to either real or personal property, under the provisions of the Code, having become vested by lapse of time, as prescribed thereby, under the 10th paragraph of the 11th article of the Constitution of 1868; still, there can be no vested right in the *remedy* under the statute of limitations. If a *prescriptive* right to property had commenced running, in favor of the possessor, prior to the war, whether it continued to run during the war, would depend, it would seem, upon whether during that time, there was any *disability to sue in the courts*.

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However, that question is not now before us, and we will not discuss it.

Let the judgment of the Court below be affirmed.

BROWN, C. J., concurred in the judgment as follows:

1. An indorsement of a promissory note, past due, for a valuable consideration, is a new contract, and the statute of limitations begins to run in favor of the indorser only from the date of the indorsement.

2. The Statute of Limitations was legally suspended for one year, by the Act of December, 1860.

3. The ordinance of the Convention, passed 1st November, 1865, declaring the statute of limitations, in all cases, civil and criminal, *to be, and to have been*, suspended, from 19th January, 1861, and that it shall so continue until civil government is fully restored, or until the Legislature shall otherwise direct, has been legalized by the new Constitution and Ordinance of the Convention of 1868, so far as it does not divest vested rights. This made it valid, so far as it was prospective, but whether it could restore to plaintiff a right of action lost by the running of the statute for the *full period* prescribed by law, before its passage, *quere?*

4. In this case, after deducting the year, during which it was suspended, the statute had not fully run in favor of the indorser, who is the party litigant, at the date of the Ordinance of 1865, by which it was suspended for the future, as above specified. For these reasons, I concur in the judgment pronounced by a majority of the Court, while I do not assent to all the propositions announced by them in the decis-

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SAMUEL C. CAMPBELL, plaintiff in error, *vs.* CYNTHIA MILLER, *et al.*, defendant in error.

1. A trustee in possession of trust property is only bound, under Code, for ordinary diligence in its preservation and protection.
2. And a trustee in possession of promissory notes as trust, property may receive payment of said notes in such currency as a prudent person under the like circumstances, would receive in payment of debts due him individually.
3. A trustee who, during the war, in good faith, received Confederate treasury notes, in payment of promissory notes held by him in trust, acted under color of law, and is protected by the Act of 1866 and the Ordinances of the Conventions of 1865 and 1868.
4. If the trustee received Confederate currency before the adoption of the Code, and after its adoption invested it in securities not authorized by law, and without an order of Court, did so at his own risk, and is liable for the value of such currency at the time when it is said to have been re-invested.
5. If the trustee changes the investment, with the consent of the *equitable trust*, who is of legal age, he is not liable for any loss growing out of such new investment.
6. It was competent to show that the investment, or changes of investment, were prudent.
7. When the Court is requested to charge the jury in writing, he shall read his charge, and make no verbal additions or explanations.
8. A written request to charge the jury must be applicable to the facts and the law, or the Court need not notice it. The Court may, if it please, charge the jury by verbally modifying it, provided his charge, as given, is the law.

Equity. Trustees. Tried before Judge GREEN. Heard in the Superior Court. October Term, 1868.

In September, 1860, Jacob Miller and Cynthia Warrick were about to intermarry, and entered into a written contract whereby it was agreed that \$2,000 00 out of her property to be in promissory notes, should remain her sole and separate property, not in law or equity subject to the payment of any debt of Miller, or in any way subject to his control, and that at her death the same should be equally divided between her children therein named. The deed conveyed said \$2,000 00 to said Samuel C. Campbell, with power of direction to him to "possess himself of, and control,

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amount, in conformity to said provisions, limitations and conditions," and Campbell so accepted the trust. Certain notes were delivered to him as trustee. Because of the alleged mismanagement and conversion of the trust fund, Mrs. Miller, by her next friend and her children, filed a bill against Campbell; she praying that he pay her the interest due to her, and they praying that he be held liable for said corpus that he be removed, and a new trustee be appointed, &c.

Answer was waived and need not be reported, further than to say generally, that he stated his management of the estate; that part of it went into Confederate currency and part into tobacco, by consent of Mrs. Miller, (all of which will appear in the testimony), and contended that, under the circumstances, he was not liable to pay anything.

Upon the trial, the complainants' solicitors read in evidence said deed, and the testimony of Mrs. Miller and one of her daughters. The daughter testified that she heard a conversation between Mrs. Miller and Campbell, in which he said to her that he thought the money had better be invested in tobacco, to which she replied: "do the best you can with it;" that he told her that tobacco would be worth four dollars per pound, in gold, at the end of the war, and asked Mrs. Miller if she would take the lawful interest for her money, and she told him to do what was right; that Campbell had a box or two of tobacco on hand at the end of the war; that she saw Mrs. Miller pay Campbell her taxes, and asked for her tax receipt; he said it was misplaced, but he would hand it to her; at another time he said he had forgotten to give in her tax, and several times since, he said he never intended to give it in during the war.

Mrs. Miller testified, that Campbell, as her trustee, received two promissory notes, amounting to two thousand dollars, one on D. M. Wilson, with Benj. Barfield and Daniel Ruff for security, which notes were given for land in 1860; Campbell told her he had collected one of them, (it was done without her consent;) that he asked her what to do with it, and she said it was best to invest it in tobacco; she then told him to

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do the best he could with it; he said tobacco would be worth five dollars per pound at the end of the war; he asked if she would take lawful interest on the money, to which she replied, "do what is right with it;" that there was due her about \$725 00 interest, she having received \$210, in 1861-2, from D. M. Wilson in 1861, and from W. H. Farmer, the interest due in 1861 and 1862.

Upon cross-examination, she stated that he had no Confederate money belonging to her, so far as she knew, nor did she ask him to invest any for her, nor had she ever received any tobacco from him; that after the war, she asked Campbell about her business, and he then said, there was a box or two of her tobacco; she rejoined that he had sold the tobacco, and he said he could produce the same brand; she neither agreed nor refused to receive said tobacco. She admitted that Dupree's notes should be substituted for some of those held by Campbell for her.

The complainants having closed, Campbell then testified in his own behalf, in substance as follows: About the last of 1860, as such trustee, he received one note on W. H. Farmer, and another on D. M. Wilson, each for \$1000 00. Farmer's note was secured by mortgage on land, and the one on Wilson had for security Benjamin Barfield, who is still solvent. He kept the notes about two years, the makers meanwhile paying Mrs. Miller the accruing interest. Then Chas. L. Dupree purchased said land from Farmer and the vendee of Wilson, and agreed to take up said two notes. Dupree paid Campbell the Wilson note in Confederate currency, about the end of 1862, which currency had not then depreciated much, if any. In order to preserve the fund, he invested it in tobacco, at \$1 55 per pound, and took Dupree's note for the Farmer note, Dupree being then solvent. Afterwards this Dupree note was renewed. In 1864, Campbell borrowed from Dupree \$1000 00, and gave him his note for the same. In January, 1865, Campbell gave up to Dupree the note he had made in 1862, in exchange for his own note, given in 1864, Dupree paying the difference, (what amount is not shewn.) The tobacco was stored. In the fall of 1864,

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boxes of said tobacco were lost or stolen, and L. T. Doyal, restorer, paid him \$1000 00 in Confederate currency therefor. Then, it took fifty dollars in that currency to buy one gold. This \$1000 00, in Confederate currency, Campbell had on hand, and it is worthless. He never appropriated a dollar of the trust fund to his own use, and managed the same as well as he did his own property. About July, 1864, Campbell bought a wagon and five mules for \$3000 00, and for \$1000 00 of this money, which he borrowed of me, he gave his said note. The wagon and team was worth \$500 00 or \$600 00. Campbell offered to pay Dupree his note, and Dupree insisted on paying his note at the time, and the exchange of notes was made to save the trouble of counting the money. Farmer is insolvent.

CHARLES L. DUPREE stated his transactions with Campbell substantially as Campbell had stated them. He stated his note was given to Campbell on the 28th of December, 1862, and then he paid him said Confederate currency; he then owned ninety slaves, besides lands, etc., and he and Farmer were good, each owning lands, slaves, etc. L. DOYAL confirmed what was said as to the purchase, the loss and payment for the tobacco, and said that six boxes were bought.

CAMPBELL, reintroduced, stated that he still had three boxes of the tobacco; that he had paid one box of tobacco to Mrs. Miller, and paid some taxes for her. He did not state the value of the tobacco paid her.

The defendant's solicitors also read in evidence Barber & Wilson's table of Confederate money, showing its value, as compared with gold, during the war. They offered a witness, proposed, by him, to prove that the investment of said fund by Campbell, under the circumstances then existing, was a prudent investment. The Judge said he would leave that to the jury. They then offered to prove that said Farmer and Wilson, two of the complainants, said that when they sold their land to Dupree, each of them contracted with him to take up their said notes held by Campbell, as they were due. The Court ruled out that testimony. The evidence

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being closed, the defendant's solicitors requested the Court to give his charge to the jury in writing, according to the usual rule. They requested him, in writing, to charge the jury

1st. That if they believed, from the evidence, that, under the circumstances at the time of the payment of the notes, a man of ordinary prudence would have received money for himself, such reception of the money by Campbell, was not such an act as, in law or equity, would be charged the defendant.

2d. That the terms of the marriage settlement in evidence do not make it the duty of Campbell, the trustee, to deliver the notes turned over to him, but that it was his duty to serve and protect the money collected on them, for the benefit of the trust-estate, as a prudent man would use his funds.

3d. That it was lawful for trustees to receive Confederate treasury notes and interest-bearing Confederate notes in payment of claims due, * * * * * and that if the defendant did receive Confederate treasury notes on the notes of Wilson and Farmer, it was no violation of the trust confided to him.

4th. That if the defendant, after he had collected the Wilson note at the request of complainant, Mrs. Miller, invested the funds in tobacco, for the purpose of preserving the trust funds, and she has received a part of that tobacco since the war, he cannot be made liable for more than the tobacco now worth, after charging her with the tobacco she already received, and if defendant has received pay for boxes of tobacco lost, in Confederate treasury notes, and money perished on his hands, he is not liable for such loss.

5th. And lastly, they asked him to give in charge the Court of the General Assembly, approved 6th March, 1860, ratifying and confirming certain acts of trustees, etc.

He charged the jury that the trustee was bound to collect and preserve the *corpus* of the trust property, in pursuance of the provisions of the deed of trust; that he was bound to ordinary diligence, i. e., to use the same care he would in the preservation of his own property; that

was bound to accept, in payment of both, or either of them, provided the makers tendered payment in gold or its equivalent; that if the trustee received Confederate money, and it was not, at the time of payment, equivalent to gold, he took it at his own risk, and is responsible for the value of the money when he first received them into his possession as trustee; that the trustee had no authority or legal right to convert the notes or their proceeds in tobacco or other property, unless under or by virtue of an order from the Chancellor; and the tobacco cannot be held and treated as a part of the *corpus* of the trust-estate, unless it was accepted and assented to by the *cestui que trust* and all of the remainder-men; that Confederate money was not a legal tender, and the trustee was not bound to take it in payment of said notes; that if he did receive it in payment of said notes, or either of them, he did so at his own risk, and if it died upon him, or became worthless, it is his loss, and he is liable for the amount of the *corpus* of the trust-estate and the legal interest which had not been paid by him to the life-tenant, in pursuance of the deed of trust; that the *cestui que trust* has no right to control the *corpus* of the estate, or direct the acts of the trustee, but that the legal title was in him, and he had the same right to manage it, as he had to manage his own property, and independent of the wishes of the *cestui que trust*, under said deed of trust, and cannot relieve himself of his liability by alleging that he acted under the advice of the life-tenant; that the box of tobacco received by Mrs. Miller, should be allowed in payment of the interest, and her possession of it is not an assent to the investment, and does not bind her and the remainder-men.

This charge was written out, and read as written. In reading it, the Judge repeated and used, at times, words different from those in the written charge, by way of explanation, but did not change or vary the written charge. In lieu of the first part of the charge, without writing out the same, that the defendant, as trustee, had no right to receive Confederate money, or any thing but gold, silver, or its equivalent, either principal or interest. He said he would modify the second

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request, and charged, without writing out the same, that the trustee could not change the character of the trust fund, except by an order from the Chancellor upon a proper case made. He refused to give the third, fourth and fifth requests.

The jury found that Campbell should be removed as trustee, and said W. H. Farmer should be trustee in his stead; that Campbell should pay to Farmer, as such trustee, \$2000 00; and that he should pay \$716 67 for unpaid interest, and that execution issue therefor and for costs, and the decree was rendered accordingly.

Defendant's solicitors moved for a new trial, upon the grounds that the Court erred in refusing to let them prove that the said investment was prudent; in repeating said sayings of Wilson and Farmer; in said refusals to charge as requested; in said modifications of said requests, because they were wrong, and because they were unwritten; in each proposition of said charge, and in the whole of it, as given; in charging other things than those put in writing, and because the decree was contrary to law and evidence, and the weight of evidence.

The Court overruled the motion, refused a new trial, and error is assigned on each of said grounds.

DOYAL & NUNNALLY, J. J. FLOYD, for plaintiff in error.

PEEPLER & STEWART for defendants in error.

BROWN, C. J.

After a careful review of this case, I am satisfied that the "written synopsis of the points decided," which was reduced to writing and delivered during the term, with the concurrence of the whole Court, covers every point that is material. I might sustain these points in a lengthy opinion, supported by numerous authorities; but I do not deem it necessary. Taken in connection with the report of the case, the following synopsis is all that is necessary to a correct understanding of the decision. I therefore annex it, as the written opinion of

he Court in this case, instead of using it as a *syllabus*, to be elaborated in the written opinion, as in other cases.

1. The marriage settlement in this case was a contract between the parties intending marriage and the trustee; which vested a life-estate in the \$2,000 00 of notes in Mrs. Miller, with remainder in her children, who are named, after her death. A trustee in possession of the trust property is only bound to ordinary diligence in its preservation and protection.

2. If the trust property consists of promissory notes, the trustee may receive payment of the notes when due, in such currency as a prudent man would receive for debts due him under similar circumstances.

3. A trustee who, in good faith, received Confederate treasury notes in payment of a note held in trust, under the Act of 18th April, 1863, acted under color of law, and is protected by the Act of 1866, and the Ordinances of the Conventions of 1865 and 1868, and if he invested said treasury notes without proper authority, or lost them by negligence, he will only be liable for their value when received, allowing him a reasonable time to re-invest. A trustee who held a promissory note in trust prior to the adoption of the Code, (1st January, 1863,) if he acted in good faith, had a right to receive payment in the currency generally received by prudent men in the transaction of their own business, and to re-invest such currency in the note of a person who was then entirely solvent; and if, by the results of the war, the maker proved insolvent, the trustee is not liable for the loss.

4. A trustee, who received payment of a note held in trust in the then currency, before the adoption of the Code, and after its adoption, invested it, otherwise than in the stocks, bonds, or other securities issued by this State, or other securities authorized by law, and without an order of Court, did so at his own risk, and is liable for the value of the currency received by him, to be estimated at the time when it should have been re-invested, allowing him a reasonable time after receipt, to obtain the order and to re-invest the fund.

5. If the trustee changes the investment, with the consent

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of the *cestui que trust*, who is of legal age, he is not liable for any loss growing out of such new investment.

6. The Court erred in refusing to allow the trustee to prove that any investment made by him, or any change of the investment prior to 1st January, 1863, was a prudent investment.

7. Counsel having asked the Court to give his charge to the jury in writing, it was his duty to do so, and he should have read it to the jury as written, without any additions or verbal explanations.

8. If counsel, in writing, requested the Court to give certain charges to the jury, such written request must be upon a point applicable to the facts in the case, and must not assume that to have been proven which is not in proof, and must, as written out by the counsel, be correct law, or the Court is not bound to notice it. If, however, the Court thinks proper to give the point in charge, with modifications, he may do so, and such modifications need not be in writing, but the whole taken together, as given by the Court, must be correct.

Judgment reversed.

JOHN J. MILLER, plaintiff in error, *vs.* MITCHEL, REID & Co., defendants in error.

1. When a party did not enter an appeal within the time prescribed by law, and has otherwise been guilty of negligence, a new trial will not be granted on account of newly discovered evidence; more especially when the evidence is cumulative, and one of the witnesses, of whom the discovery is alleged to have been made, gave evidence on the trial, and the other was a clerk of the party moving for the new trial, at the time of the transaction, and the motion is not made more than twelve months after the rendition of judgment.
2. Under the 6th section of the 11th article of the Constitution, motions for new trials, bills of review, or other proceeding, to vacate judgments, orders or decrees, made since the 19th of January, 1861, must be for *fraud*, illegality, or error of law. That section does not relieve one who was cast in his suit, or lost his rights by his own negligence.

New trial for newly discovered evidence, etc. By Judge POPE. Fulton Superior Court. October Term, 1868.

Miller brought "case" against A. W. Mitchell, John M. C. Reid and F. M. Richardson, as warehousemen, under the firm-name of Mitchell, Reid & Co. He averred that on the 10th of August, 1865, as such warehousemen, they received sixteen packages, containing many valuable chattels, (a bill of particulars of which was given, in which the aggregate value of the goods was put at \$1,757 00,) worth \$4,000 00, to be taken care of and re-delivered to him, and that by their carelessness the goods were lost.

The defendants said that they had delivered the goods. The cause was tried, before a petit jury, in October, 1867, and resulted in a verdict for \$1,768 00 and costs for the plaintiff, and judgment was entered for the same. An adjourned term of the Court was held. On the 5th day after the final adjournment, Richardson applied to the Clerk to enter an appeal, but the Clerk would not allow it entered at that time. *Fi. fa.* issued, but had not been collected at October Term, 1868.

At that term, said defendants moved for a new trial, upon the grounds that: 1st and 2d. The verdict was contrary to law and evidence. 3d. Because the jury acted corruptly. 4th. Because of Richardson's mistake as to appealing. 5th. Because of certain newly discovered evidence; and 6th, and lastly, because the defendants, and their attorneys, were taken by surprise on said trial by said plaintiff testifying in person and denying the agency of Tomlinson.

With this motion was an agreed brief of the evidence, which was substantially as follows: Plaintiff and family refuged from Tennessee to Baldwin county, Georgia, and in August, 1865, was removing to Cowan, Tennessee. His family went forward to Cowan, and he shipped said packages for that place, marked to his son, R. H. Miller, who was to receive them. The railroad receipt taken by him called said goods a lot of old furniture, that is to say, eleven boxes, one barrel, one bale, one bale slats, one rocker, two chests, one

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chest, one trunk." These goods came to Atlanta by railroad and for want of store-room, and because they could not be sent forward, they were, by the M. & W. R. R. agents sent to defendants for storage. They kept the goods about the 15th of August. Mr. Tomlinson, of Tennessee whom Richardson knew, came to Georgia, and plaintiff wife asked him to look up the goods, giving him a written *memorandum* of the packages, etc. He inquired for goods at Macon, learned that they had come to Atlanta and traced them to the possession of the defendants. He showed defendants his *memorandum*, which corresponded with the goods in their possession, told them that plaintiff was very anxious to receive the goods, that plaintiff was responsible and punctual, and would send the amount of money needed when advised what it was. They said the railroad agents would not ship goods till freight was paid. He suggested telegraphing R. H. Miller, and wrote a dispatch to be sent, putting the amount at \$97 00, to pay freight and defendants' charges on the goods; the dispatch was sent off by defendant, but no answer was received. He also wrote on defendants' book a direction to send the goods to the care of T. Crutchfield, Chattanooga, Tennessee. The defendants said they would send the goods next morning, that they would advance the freights and wait for Miller to pay them. Tomlinson swore that in this he was not acting by employment or agency, but in a neighborly way, in order to have the goods forwarded. The defendants, next day, sent the goods to the W. & A. R. R. in drays, giving Henry Mitchell, son of one of the defendants, and their clerk, the money to pay the freight. When Tomlinson went to the train to go home, at about noon next day, he saw but two or three of the boxes, and was told by the shipping clerk that the rest had not been put upon the train because they did not arrive in time. R. H. Miller and his mother having been informed by letter from the defendants of said shipment of the goods, went to Chattanooga, but did not find them there. Meanwhile, plaintiff had gone home. He sent a Mr. Hirsch to search for the goods. He called on the defendants for

da, and was told by them of their shipment of the goods, foresaid, and that the persons then in charge of the W. & L. R. did not then give receipts for goods. While they talking, Mr. Burr, one of their clerks, came in, and that the goods had remained on the platform of the W. R. R. until the evening before, and had then been moved over to Oliver & Woddail's ware-house. Thereupon Hines went over to Oliver & Woddail's, found most of the boxes, with no trunk, except a chest broken to pieces. All the boxes, except one or two, appeared to Hines to have been opened and searched and nailed up again. They were taken to Oliver & Woddail's about the last of September, after the W. & A. R. R. was turned over to the civil authorities, and because the agent knew not what else to do with them, there being no railroad depot at that time in Atlanta.

Hines, before he left Atlanta with the goods, paid Oliver & Woddail's storage, and defendants' claim for storage, and the freight which they said they had paid out, through Henry Mitchell, making a total of \$108 00, because they had paid the same of him before moving the goods. (It was not shewn that Henry Mitchell did pay the freight.) The goods arrived safely at Cowan, except what were missing, and Hines came after them. The fact that they were missing, and what they were, and their value, was shewn by the testimony of plaintiff's daughters and a Miss Hines, they testifying that the bill of particulars was correct. There was no evidence as to the value of the goods offered by defendants.

All these facts were shewn by interrogatories.

The plaintiff was sworn on the trial, and testified, that Henry Burr was not his agent, that he was his neighbor, and was merely asked to make inquiry for the goods as he was going south.

Oliver & WODDAIL also testified as to how he got the goods, that the boxes were in very bad order, seemed to have been broken or plundered, and for some time exposed to the weather; that Mr. Burr came with Hines for the goods, and they put the goods in shipping order, packing up all they had received.

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RICHARDSON also testified in person on the trial, but not materially changing what is aforesaid.

Movants also produced certain affidavits of the following purport, to-wit: several affidavits made by jurymen who tried said cause, as to the misconduct of their fellow-jurymen; an affidavit of said Burr, in which he stated, that at Oliver & Woddail's there was but one old chest and one common sized trunk that had been broken open; a part of the contents of the chest were missing, (at least it was only partly filled;) the trunk had nothing in it; there was one slat off of one large box, but apparently nothing had been taken from it; it had bed clothing on top, and apparently had not been interfered with; that he assisted the young man (Hines) in re-packing and fixing up the packages for shipment, and they were shipped off by the young man; and that, judging from the size of the chest and trunk which had been broken into, they could not have held half the quantity of goods mentioned in said bill of particulars; that if the goods not taken were as valuable, proportionably, as those lost, judging from the number and size of the packages, they would have been worth from \$15,000 00 to \$20,000 00. An affidavit by said Waddail, that said boxes were overhauled and re-packed while in his store, that the goods were mostly quilts, counterpanes, etc., and, among the rest, a bolt of brown domestic, and that he did not believe the whole of them worth \$300 00. They, the defendants and their attorneys, made affidavit that they knew nothing of the facts stated in Burr's and Woddail's affidavits till a few days before this motion for new trial was made; affidavits by defendant's attorney, that Richardson alone attended to said case for the defendants, and was instructed to enter an appeal, and that he must do so within four days from the final adjournment of the Court; by Richardson, that acting for his firm, by special understanding, he was to appeal; he, from a mistake as to the time in which an appeal ought to have been entered, applied one day too late, and the Clerk refused to receive the appeal; and finally, an affidavit of the defendants' attorney, in the Court below, that the defence had been based solely upon the ground

of delivery to plaintiff's agent, and that when plaintiff, in person, denied the agency of Tomlinson, it took him by surprise.

At the hearing, plaintiff's attorney objected to the grant of a new trial upon the ground that said defendants had a bill for a new trial in this case then pending. He was told by the defendants' attorneys that said bill was dismissed. He then objected that this motion came too late, and contained no sufficient ground for a new trial under the facts.

After argument had, the Court ordered that there should be a new trial, and this order is assigned as error. In the Supreme Court, the question as to the misconduct of the jury was not insisted upon.

HILLYER & BRO., for plaintiff in error, cited the following authorities: On the subject of failure to appeal, and analogous cases where parties lost their remedy by failing to move within the time limited by statute. *Gordon vs. Robertson*, 28 Ga., 411; *Dean vs. The State*, 9 Ga., 406; *Wooten & Co. v. Nall*, 18 G., 608, 30 Ga., 43; *Neal et al. vs. Crew*, 12 Ga., 93; *Taylor vs. Holland*, 20 Ga., 12; *Leak vs. McDowd*, 6 Ga., 264; *Duke vs. Griffin*, 6 Ga., 319; *Arnold vs. Wills and wife*, 6 Ga., 381; *Russell vs. Marsh and Brians*, 6 Ga., 491; *Turner vs. Collins*, 8 Ga., 253; *Hightower vs. Hightower*, 13 Ga., 204; Code, 3057, 3537, 3121, 3660, et seq. On the question of how far discretion of the Court below will be controlled in a case like this: *Georgia Railroad vs. Scott*, 37 Ga., 101; *Camp vs. Howell*, 37 Ga., 312; *The People vs. Superior Court of New York*, 5 Wendell, 127. On the subject of newly discovered testimony, as to want of diligence, immateriality, etc. *Bevy vs. The State*, 10 Ga., 527; *Roberts vs. The State*, 3 Kelly, 323; *Monroe vs. The State*, 5 Ga., 139; *Beard vs. Summers*, 9 Ga., 4; *Giles vs. The State*, 6 Ga., 276; *Carlile vs. Tidwell*, 16 Ga., 35; *Wright vs. Greenwood*, 17 Ga., 418; *Wright vs. Central Railroad*, 21 Ga., 346; *Mitchell vs. Printup*, 25 Ga., 182; *Dickson vs. Solomons*, 26 G., 689; *Avery vs. The State*, 26 Ga., 22; *Roach vs. The State*, 34 Ga., 83; *Wright vs. The State*,

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34 Ga., 114; *Jones vs. McCrea*, 37 Ga., 48; *O'Barr vs. Alexander et al.*, 37 Ga., 204; *Dupree vs. Price*, 37 Ga., Graham on New Trials, 463, *et seq.*, 10 Wendell, 28 Hunph, 251, 5 Serg. & Rawle, 41; 2 Binn, 582; 8 Job 86; 15 Johnson, 212; 18 Johnson, 489; 2 Caines, 4 Johnson, 425 and note; 5 Wendell, 126; 3 Schan 483; Graham on New Trials, 192.

A. W. HAMMOND & SON, COLLIER & HOYT, for defendants in error.

BROWN, C. J.

1. We think the Court below erred in granting a new trial in this case, as the defendants in the Court below bring themselves within no rule of vigilance which will justify the action of the Court in their favor. In the preparation of the case for trial, no effort seems to have been made to rebut the allegations of the plaintiff as to the value of the goods. Indeed, the case was risked upon the point that the defendant had delivered the goods to an agent of the plaintiff, and was not therefore liable. Upon the trial, the plaintiff appeared in Court, and swore that the person who assumed to deliver the goods was not his agent, and the jury no doubt believed him, as is readily inferred from their verdict. If the defendants were surprised by this, they had a perfect legal remedy. They had weeks within which to enter an appeal, as there was an adjourned term of the Court, and they were in time if it was entered within four days after the final adjournment of the Court. No appeal was entered, and no attempt was made to appeal, till the fifth day after the end of the term. This was gross negligence on the part of the defendants.

The judgment was rendered at the October term, 1868. No further effort was made by the defendants to set it aside or to obtain a new trial, till after an execution had issued. It then appears, from a transcript of the record, that a bill was filed praying an injunction and a new trial, which the Chancellor refused to sanction, on the 1st June, 1868. The bill was then abandoned, and the matter rested until the next term.

October, 1868, more than a year from the date of the verdict, when the present motion was made.

The only plausible ground in this motion is the newly discovered evidence of Burr and Woddail, as to the value of the goods, their condition, etc. But the same difficulty arises that runs through the whole proceeding, so far as the defendants are concerned. There has been no diligence.

Burr was the clerk of the defendants at the time the goods were stored with them; and it was their duty, when preparing for trial, to have made diligent inquiry of him as to his knowledge of these facts. They failed to do this, and the present application is made, partly on the ground that they discovered that he knew important facts about the goods, after the trial.

Woddail was sworn and examined as a witness, on the trial, although the goods had been stored with him and his clerk, after they were found at the railroad depot, not a month before. He is asked him by the defendants on the trial as to their condition, value, and the like. Why did they not then ask him what he knew on these points?

The 6th section of the 11th article of the new Constitution of this State is invoked in aid of the application. It declares that "no motion for a new trial, bill of review, or proceeding to vacate any judgment, order or decree, since the 19th of January, 1861, by any of said Courts founded on *fraud, illegality or error of law*, shall be denied by reason of the time having been moved in time. *Provided*, said motion or application is made in twelve months from the date of the rendition of this Constitution."

The Constitution was certainly not intended to grant new trials in all cases tried since 19th January, 1861, especially when the party was cast in the suit, and lost his rights by his own negligence. In this case, there is no proof that either fraud, illegality, or error of law exists.

It is complained that the verdict was too large. We think it may be true. But as the defendants took no legal steps to set it aside, and acquiesced in it till after the time allowed

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them by law to move in the matter, we have no power to afford them relief, without the violation of well established rules of law.

Judgment reversed.

CHAS. C. CLAYTON, plaintiff in error, vs. WARREN AIKIN, ex'r of John Clayton, Sr., defendant in error.

AGNES CLAYTON, plaintiff in error, vs. CHAS. C. CLAYTON, defendant in error.

1. A money legacy left to the executor of a will, though expressed to be "in addition to the usual commissions obtained by law, and as a compensation for any extra trouble he may have in executing the will," is a general legacy, and cannot, as a legacy, be exempted from abatement with other general legacies, in case of a deficiency of assets.
2. When a testator, in a single item of his will, gave to his wife \$1500 in money, various articles of personal property, and a life-estate in certain house and lot, and its appurtenances, with the privilege, if so desired, to take \$1000 00 in money instead of the life estate in the house and lot, and in a subsequent item distinctly declared that the "legacy" left his wife was in lieu of dower:
Held, That the word "legacy," in the last item, covers all the several bequests of the first, and, should she prefer the \$1000 00 in lieu of life-estate, and elect to take her "legacy" in lieu of dower, she takes *all the several* bequests in her character as doweress.
3. When a legacy left to a wife is expressed to be in lieu of dower and she elects to take the "legacy," she takes it as a *quasi* purchase, and in a contest between her and other legatees, whether general or specific, she cannot be called upon to abate with them, to make good a deficiency of assets.
4. A legacy in Georgia may be adeemed, by the delivery of the property to the legatee, during the life-time of the testator, and if it be so adeemed, it does not pass under the will, and is not subject to abatement on a deficiency of assets.
5. Whether a legacy has been in fact adeemed, is a question of fact to be left to a jury, under the evidence in the particular case. "delivery" to the legatee must be of such a character as to show it was the intent of the testator to part at that time irrevocably with his dominion over the property.

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for direction. Order of distribution. Ademption.
by Judge POPE. Bartow Superior Court. Octo-
ber, 1868.

John Clayton, Sr., of Bartow county, Georgia, made a
will containing the following bequests :

3d. I give and bequeath unto my wife, Agnes
absolutely, three negroes, to-wit : (naming them,)
\$1000 00 in money, to draw interest from the time of
death. I also give to her, my said wife, the house,
kitchen-house, hen-house, garden, orchard, and the
orchard is on, and enough land for turnip and potato
here I now reside, and fire-wood from off my land
Alatoona, for and during her natural life, and at her
death her houses and out-houses, garden, orchard, and the
orchard, houses and patches are on, to be sold, and
the proceeds to be equally divided between John Clayton and
Polk Clayton, two sons of a nephew of mine.
If my said wife should desire not to reside at said house,
the same, or should relinquish her rights to the
same, then I give and bequeath to her, absolutely, the
\$1000 00, to be paid out of my estate. I also give
and bequeath to my said wife, such part or parts of my house-
kitchen furniture as she may desire and select for
herself, and should my wife leave said dwelling-house
houses herein-before given her for life, with the
orchard, and patches mentioned, or relinquish her
rights in the same, then said house, garden, etc., may be
sold at any time, and must be sold with the farm lying near
and connected with the said houses, if the houses,
etc., are left or relinquished in time to be sold with

4. I give and bequeath unto Charles Collier Clay-
ton, son of my nephew, the plantation lying on Alatoona
in the county of Cobb, in said State, which plantation
was sold from William and James McEver, also the fol-
lowing slaves, (naming twelve slaves,) also one horse, one
cow, one wagon, and the plantation-tools now on
the same. XXXVIII—21.

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said plantation, or that may be on it at the time of my death. (This item also gave to him two other old slaves, with request that he take care of them.)"

(ITEM 5 was a bequest of two slaves to one Letty Crow.

"ITEM 6. All my plantation and land lying near Alatoona in Bartow county, (except as before provided,) and all the remainder of the negro slaves, and all my other horses, mules, cows, hogs, plantation-tools, wagons, carts, household and kitchen furniture, (except as before bequeathed,) and all other property I have or may have at the time of my death, I will sell by my executor, at public out-cry, either for cash or for credit, and either with or without an order of the Court Ordinary, as my executor may think best, and the money arising from the sale of the land, after paying the expenses of selling, commissions, etc., to be equally divided between the said John Clayton and James K. Polk Clayton, share and share alike, and the money arising from the sale of the last mentioned negroes, and all other property, and all money collected that may be due and owing to me at the time of my death, or that I may have on hand at the time of my death, after paying the specific legacies and necessary expenses of administration, and all that may arise from sale of any other property I may own at the time of my death, either real, personal or mixed, I give and bequeath unto the children of my deceased sister, Elizabeth Logan, who died in the State of Alabama, and to the children of my deceased brother, Charles C. Clayton, who died in the State of Mississippi, share and share alike, each child to have an equal share, and if any of my said nieces or nephews should now be dead, or should be dead at the time of my death, leaving a child or children living, then said child or children are to take and receive the share his or their mother or father would have received, if living. "Item 7th. The legacy herein given to said wife is intended to be in lieu of any dower in and to any real estate or land I may own at the time of my death."

(Item 8th gave everything which he might acquire, and which was not disposed of by said will, to said nephews and nieces mentioned in the 6th item.) "Item 9th. I hereby

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nominate and appoint Warren Akin sole executor of this my will, and in addition to the usual commissions at law, I give and bequeath to him one thousand dollars as a full compensation for any extra trouble he may have in executing this my will, and he is in no event chargeable for interest on money he may have in hand, unless he refuses or fails to pay it over to the person entitled thereto, when he is legally and properly called on for it by the person so entitled to it."

In September, 1862, when this will was made, John Clayton, Sr., owned much personal property, which was afterwards lost or destroyed by the war. He died on or about the sixth day of November, 1864. Akin proved the will and qualified as the executor. Agnes Clayton, the wife of testator, relinquished all her rights to the life-estate given to her by the 3d item of said will, and selected and received the furniture given her in said will, and elected to take her legacies, and relinquish her right of dower. James K. Polk Clayton died on the 11th of August, 1864, and Charles Collier Clayton became his administrator. Akin sold all the personalty, except promissory notes and other evidences of debt, had rented out the land mentioned in said 6th item, and the houses on the land at Alatoona, and offered to sell some corn which was made in 1865, by the tenants, as rent-corn, on the land mentioned in said 4th item, as given to Charles Collier Clayton, and offered to rent out said land for 1866, but Charles Collier Clayton claimed the corn and the land, though he had no title to the land, except as such legacy, and to that the executor had not assented.

To pay Agnes Clayton said \$2,500 00 and interest, and said \$1,000 00 to Akin, for extra trouble in executing said will, the demands against the estate, if all of them are established, and all the expenses of executing said will, will require over \$5,000 00; and all the personal effects and assets of said estate, debts due and demands, the rents of the Alatoona lands and houses for 1866, and the estate, except the lands devised to Charles Collier Clayton in said 4th item, and the land required to be sold and its proceeds to be divided between John Clayton, Jr. and James K. Polk Clayton, as

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mentioned in said 6th item, will not amount to more than about \$2,000 00. Therefore, it is absolutely necessary resort to the lands mentioned in said 4th and 6th items of the will, to pay the expenses of the administration, the debts of the estate, and to pay Agnes Clayton \$2,500 00 and interest; and if the legacies mentioned in said 4th and 6th items are specific legacies, then they must abate, in order to make such payments. The value of said rent-corn and the rent of said land, (worth say \$500 00,) ought also to be applied to the payment of said debts, etc. Said bequests to Agnes Clayton having been taken by her in lieu of dower, should not abate. Charles Collier Clayton claims that the land bequeathed to him in said 4th item, and the corn made there since the death of testator, belongs to himself, and that neither is subject to the payment of the expenses of administration or said debts, until the land mentioned in said 6th item and the residue of the estate is first exhausted.

With an averment of the foregoing facts and views as to the law applicable to them, Aikin, as executor of said John Clayton, Sr., filed his bill for direction against said Agnes Clayton, said John Clayton, Jr. and Charles Collier Clayton, individually, and as administrator of said James K. Polk Clayton, praying the judgment of the Court upon the following questions:

1st. Has the legacy of James K. Polk Clayton lapsed? And if so, how shall it be disposed of?

2d. Is the legacy to John Clayton, Jr., and to James K. Polk Clayton, in said 6th item, a special legacy, and does it stand on the same footing with the legacy to Charles Collier Clayton, and must each be abated, *pro rata*, to pay the debts of the estate, the expenses of administration, and the bequest to Agnes Clayton?

3d. Is Agnes Clayton's an ordinary specific legacy, and must it be abated, *pro rata*, with other specific legacies?

4th. Is not the corn, grown on the land devised to Charles Collier Clayton, in 1865, and for the rent of the land for 1866, subject to the payment of said debts and expenses?

He prayed for general relief, for a specific decree against

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as Collier Clayton for the value of said corn, and that defendants should answer touching said averments.

The main facts of the bill were not denied. But John Clayton answered that he went into possession of the bequeathed to him by said 4th item, under the following agreement, viz: In the spring of 1863, testator told him he had given to him that farm, which was then in possession of a tenant under a lease; that testator said, "I give possession of it at once, you paying said tenant a reasonable price for the balance of the term for which he had leased farm;" that he then paid the tenant \$600 00 for said expired term, and went at once into possession under said agreement, and had ever since so remained in possession thereof himself or tenants, and he claimed it and the corn, as set out in the bill. He contended that that legacy was not abated.

Agnes Clayton also answered the bill, admitting the facts, and that Aikin, as executor, had paid her \$300 00, for her year's support, and \$600 00 of her money legacy, but contended that her legacy, being in lieu of a relinquished dower, should not abate.

On the trial a witness testified, that soon after John Clayton Sr., made his will, he requested the witness to tell Charles Collier Clayton that he had given him said farm; the witness did tell him so, and Charles Collier Clayton bought out the tenant, paying him several hundred dollars, took possession, which was approved of by the testator, and the testator ever afterward spoke of it as the property of Charles Collier Clayton.

WARREN AKIN testified, giving a detailed statement of arguments held by him in favor of testator, stating that he had notice of many claims against the estate, some of which were in judgment; that he hoped to get rid of some of the claims, but that if they all had to be paid, it would be impossible for the personal assets to pay the debts and Agnes Clayton's year's support, \$300 00, and her legacy of \$2500 00, and the \$1000 00 due to himself, and the other expenses of administration, even though he might collect all the judg-

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ments in favor of the testator, and use one-half of the proceeds of the land devised to John Clayton, Jr., and James K. Polk Clayton. He explained the probabilities of collecting and of having to pay the claims *pro* and *con*, showing that the payment of the debts, without a resort to the legacies, was at least doubtful. He also testified that when he sold certain land of testator, he did it when there was a great demand for land, and after extensive advertisement.

As to Charles Collier Clayton, AKIN testified, that he knew he ought not to take that land, if he could avoid it, because he knew that Charles Collier Clayton was testator's favorite, and that testator wished him to have the land. As to his own claim, he testified that testator applied to him during Court to write his will, and wished him to act as executor; that he declined saying to testator that in his (Akin's) opinion, as a general rule; executors who acted honestly and fairly were not paid for their services, and for that reason, he had never been an executor, administrator, or guardian, and would not voluntarily place himself in a position where he might be tempted to do wrong, in order to get compensation for his services; after some conversation, testator proposed to give him \$1,000 00, besides the regular commissions, as a compensation for all labor and trouble which he might have in executing the will; to this, Akin agreed, wrote the will, read it over to the testator and the witnesses, and it was executed. He said he would not have consented to act as executor, nor have qualified as such, but for said \$1,000 00; that he had already attended to a claim case for the estate; had filed the bill in this case, and had never employed any counsel for the estate, except that he had retained Judge Walker at this trial, and had put some notes out for collection, when he could not attend to them in person. On the trial, Charles Collier Clayton offered to testify as to said gift of the farm to himself, but the Court held him incompetent. He also offered to show, as a witness, that Akin had sold certain land of the estate, when it was unnecessary, and for less than it was worth, and the Court held that that was irrelevant. He offered to show that the debts due to the estate were

in excess of those due by it. The Court rejected said
ony. After argument had, the Court instructed the
ow to find, and they accordingly found a verdict, and
was a decree as follows :

t. That the \$1,000 00 to Aikin was a part of the
es of administration, (but that this finding was not
clude creditors, not parties to this bill, as to that
0 00).

That the \$1,000 00 due Agnes Clayton, in lieu of
, is a debt of the highest dignity, and with the
00 allowed her as her year's support, should be paid
any other debt or legacy, (the \$900 00 already paid
of course to be deducted).

The \$1,500 00 willed to her is a general money
, and should not be paid till all the specific legacies
atisfied.

. That the proceeds of the land near Alatoona, where
or lived and died, was a specific legacy to James K.
Clayton and John Clayton, but that, inasmuch as Jas.
olk Clayton died without issue, before testator died,
egacy lapsed, and was assets in the hands of the execu-
and should be paid to the widow on account of the
0 00 due her, with interest, less said \$900 00.

1. That, after paying the widow, the next payment
d be the expenses of administration, including the
0 00 to Aikin, and then the other debts due from said
e should be paid.

2. To make these payments, that the *residuum* of the
e, including said lapsed legacy, be first used, and if that
insufficient, then the general legacies, say said \$1,500 00
e widow, and if that was not sufficient, then said lega-
to John Clayton, Jr., and Charles Collier Clayton, *pro*
and that the cost of this proceeding be paid as part of
expenses of administration.

3. That Charles Collier Clayton has no title to said
except that derived from the will, and none by the
gift, and that he pay \$575 00, and interest, for
the farm for 1865 and 1866, and this to be taken, if

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necessary, to pay the debts, before resorting to said itself, or to the specific legacy of John Clayton, Jr.

The verdict was signed by one who was not of the which tried the cause. This happened in this way: 1 being no fact in dispute, the argument was had as to the of the cause, and when the Judge pronounced his opinion time was given to draw up the decree, and when it ready, the Judge instructed the acting foreman of the, then in the box, to sign the verdict, the Court understanding that the counsel all consented thereto.

Charles Collier Clayton assigns that said decree is neous, because the verdict was so signed; because of the and 5th items of the decree, classing Akin's \$1,000 (expenses of administration; the finding that the land Alatoona Creek, belonging to Charles Collier Clayton, specific legacy, and subject to the said debts, and liable abatement *pro rata* with other specific legacies, and the said 7th item of the decree; and the refusal to let testify or to show that Akin sold said land unnecessarily for too little, and that the debts due to the estate were excess of those due by it, were all erroneous.

Agnes Clayton assigned as error the finding that \$1,500 00 was a general money legacy, and not to be till after the debts and specific legacies were satisfied; the devise of the Alatoona land to Charles Collier Clayton to the land to John Clayton, Jr., were specific legacies to be enjoyed in preference to her said provisions in her dower.

Thus were made the foregoing two cases, which below here were treated as one.

W. T. WOFFORD and L. E. BLECKLEY, for Chas. C. Clayton, said, "legacy" will be made to embrace realty to carry out testator's intention, 2 Bou. Dic., 17; 5 T. R., 716; 1 R., 268; 7 Vesey R., 522; 2 Caines R., 345. "Proper" includes realty and personalty. Code, sec. 5; and a specific legacy is one operating on designated property. Code, 2422. Delivery of the property adeems. Code, sec. 2424.

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Dic., 69; 19 *Geo. R.*, 316; 2 W. and T.'s Leading part 1st, page 455, *et seq.* Akin's \$1,000 00 bequest general legacy. Code, sec. 2431. A gift is good by deed without a deed. 11 *Geo. R.*, 177. Every devise of the nature of a conveyance. 2 Atkins R., 437; 35 *Ga. R.* Contract to convey by will, after consideration passed, is good. 23d *Ga. R.*, 431. As to specific performance, see Code, sec. 3131-3. How buying out the tenant affected the tenant's title. See 1 Story's Eq. Juris, sec. 761, 762, 763. A gift is not always a benefit. 3 Kelly, (*Ga. R.*), 480-1. A declaration may consist in injury. Code, sec. 2698. No exception to the rule that specific legacies take before general legacies. Code, sec. 2431, 2495. Akin's \$1,000 00 is a general legacy, and liable to abate. 2 Wms. on Ex'rs., 978; 1 Redfield on Wills, sec. 56, par. 12; 2 Vern, 434; 2 P. Wms., 171; 4 Bro. C. C., 349. It is general legacies that abate in favor of the widow. 2 Wms. on Ex'rs., 976; Redfield on Wills, sec. 56, par. 10; 1 P. Wms., 126; 2 Benr., 420; Ambler, 244; 14 Sim., 258. This is not a declaration by C. C. Clayton. 9 *Ga. R.*, 278; 31 do., Code, sec. 3104-5-7.

AKIN and D. A. WALKER, for Akin and the widow, "ademption" was not applicable to realty. Wms. on Ex'rs., 1145; note P. Redfield on L. of Wills, 539; Roper on Legacies, 380; Code, sec. 2440; Statute of Frauds, sec. 6. "Ademption" not applicable to C. C. Clayton, because he was not testator's child, nor stood in the place of a child. Story's Eq., secs. 1116, 1117, 1118. The \$1,000 00 to be paid is part of the expense of administration. Code, sec. 2420. Wms. on Ex'rs., 905, 1169-70-80-81, 1576-78-79-82. The evidence offered as to the sale and *quantum* of personal assets was irrelevant. Redfield, 549, 551; 6 *R.*, 277-298; 6 Metcalf R., 50; Ambler, 244; 7 John R., 262. "Legacy" generally applied to personalty. Bou. Dic. Legacy; 2 Roper, 1486; 2 Wms. on Ex., 171. The intention must be looked to. Code, sec. 2420, part 2d. Taking in lieu of dower, she is a purchaser.

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2 Scribner on Dower, 496, sec. 59, chap. 17; 1 W. & T.'s L. Cases, 320, (edition of 1852); 1st Roper, 431 to 433; 2 Wms. Ex'rs., 1169, 1175; 9 Watts, 265; 2 Redfield on Wills, 749; 1 P. Wms., 126; 2 Ves. Sr., 420 to 422; *Ib.*, 417-418; Jarman on W., 404-408, etc.

McCAY, J.

1. The legacy of \$1,000 00 to the executor is, in every aspect of it, a general legacy; and as to abatement, in case of a deficiency of assets, must take its fate as such. It has been argued that the terms of the bequest are such that the legatee, in this case, is not a volunteer, but stands upon the footing of a purchaser. The authorities are abundant against this position. 2 Williams Ex., 1171; Fretwell vs. Stacy, 4 Vesey, 434; Attorney General vs. Robins, 2 P. W., 23; Herron vs. Herron, 2 Atk. 171. In all these cases the legacy was for "the care and pains" of the executor, language which is, in effect, the same as is used by Mr. Clayton. It will be observed that this is not a question whether the legacy is a good one, or whether it is dependent on the executor acting, but whether it is a legacy which may be called upon to abate, with other general legacies, on a deficiency of assets. The distinction adopted in the cases is, that to constitute a legatee a purchaser, he must have had a *subsisting right* at the death of the testator. He must have given up something *due*, some right actually in existence as a legal claim, at the time the will took effect. The widow's dower and a debt due from the testator to the legatee, are examples. Here is no debt. At the death, there was even no claim. It was at the option of the executor to act or not. Had this been a contract, binding upon both parties, made during the life of the testator, it might come within the rules; but, obviously, both the testator and the executor were unbound. The former might, at his pleasure, have made a new will, and the latter have refused to qualify. Nor is there any harm done. The executor acts with his eyes open. He has time to examine into the *status* of the estate before he qualifies, and he may easily

Now whether he will get the legacy in full. As a legacy, therefore, this must be considered a general legacy, liable, if necessary, to abate as such. The Court, in this case, seems to have considered this \$1,000 00 as part of the expenses of administration. It is either a legacy or nothing. If the executor, in this case, gets a thousand dollars, is it not that much more than the law will allow? It is, then, a bounty of the testator—a legacy—and the only question is, is he a purchaser or not? Suppose he fails to qualify, has he any claims against the estate? Has he given up anything to take his? The expenses of administration are fixed by law. Much as the law allows he is entitled to. Here is a fixed sum of \$1,000 00, given as a legacy. We are not able to see the force of the argument which gives this the dignity of expenses. It is a legacy, and nothing more, nothing less, given for good reasons and with good purposes, and standing upon the footing of other legacies, given for considerations and motives not amounting to a legal obligation, as past kindnesses, affection, moral obligations, etc.

2. The testator gives to Mrs. Clayton \$1,500 00, in money, and various articles of personal property, and a life-estate in certain realty, with the privilege of taking \$1,000 00, in lieu of the life-estate. All this in one item of the will. In a distinct item, he declares that the "legacy" to his wife, is in lieu of dower. It seems to us conclusive, that by the word "legacy," he meant all that he had given her in the former item. The life-estate in the house and lot is not, perhaps, technically, a legacy, but the liberty to choose, in lieu of it, \$1,000 00, clears up even that difficulty. We are of opinion, therefore, that the entire bequest, in item third, constitutes the "legacy," which was given her in lieu of dower. She has, first, her option to take her dower or resort to item third of the will. When she has done this, she may, at her pleasure, take the life-estate in the house and lot, or \$1,000 00, as part of her legacy.

Nothing is better settled than that the wife is a purchaser of a legacy, which she chooses, under a will in lieu of dower.

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At the death of the testator, she has a legal *right* dower. It overtops all legacies, specific as well as general. It is a right superior even to the claims of creditors when she accepts the offer of exchange, tendered her will, and gives up her dower, she pays a valuable consideration for the portion which she accepts; 1 Roper on Leg. 432; Burridge vs. Brodyell, 1 P. Wm., 126; Blane vs. Merett, 2 Ves., Sr., 420; Darenhill vs. Flecher, A. 244; Norcott vs. Gordon, 14 Simmons, 258; Isenbrow vs. Brown, 1 Ed. Chan. R. 441; Locock vs. Clarkson, 1 Saussure, 176; Heath vs. Dendy, 1 Russ., 543; Williams vs. Williamson, 6 Paige, 298. The cases in Ambler 2 Ves., Sr., 420; and 1 Russ., 543, even go so far as to say that this exemption from abatement, in case of a legacy though general, in lieu of dower, in case of a deficiency of assets to pay debts and specific legacies, exists, though the legacy be of greater value than the dower. How far this may be true, as against creditors, there seems to be no opinion. Perhaps, in such a case, the amount of the exemption might be of moment. That this exemption from abatement is good even as to creditors, does not appear to have been expressly settled. When it is a *bona fide* option, the principle would seem to go even to this extent. If it is a purchase, creditors are not injured, since, in lieu of the legacy, the testator has thrown into the fund, out of which they are to be satisfied her dower. The point, however, is not distinctly made in this case, and we do not settle it.

4. It is very plain that, if, at the death of the testator, he was *not the owner* of the farm on Alatoona creek, in Wilkes county, given in the fourth item of the will to Charles Clayton, that legacy was adeemed. If he had sold it to some third person, or given it away in any binding manner, it would not have passed under the will. The legacy, if it have been adeemed; destroyed, is perhaps the most appropriate word. It would not have existed as the property of the testator, and could not, therefore, pass by his will.

Our statute is as follows: "A legacy is adeemed or *destroyed* wholly, or in part, whenever the testator, after making

all, during his life, *delivers* over the *property* or pays the money bequeathed to the legatee, either expressly or by implication, in lieu of the legacy, or when the testator conveys to another the specific property, and does not afterwards become possessed of it, or otherwise places it out of the power of the decedent to deliver over the legacy." Code, section 2427. Evidently, the point of this section is, that if the property, at the death, does not belong to the testator, then the legacy is *destroyed*. Now, it can make no difference who is the owner, if it has ceased to be the property of the testator. If he has delivered it over to the legatee in such a manner as to divest himself of the power to dispose of it before his death, then the legacy, as such, is destroyed. It does not pass under the will, for the simple reason that it has passed before the death. It is not, therefore, a legacy at all, and cannot be abated. It stands upon the footing of a gift during life.

5. But whether this be so or not, is a question of fact, to be decided by a jury under the evidence. If the testator, after making his will, "delivered over" this tract of land to Charles Clayton, with intent, (to be made apparent by the facts as they occurred,) to part with his own right and dominion over it, at that time, then it ceased to be his; he gave it away during his life, and by that act he destroyed the legacy, and it did not pass under his will, but by his act during life. We express no opinion as to what the facts do establish. That is for a jury to determine, under the charge of the Court, as to the law, as we have declared it. By the peculiar language of our Code, sec. 2427, it is provided that "the delivery over of the property to the legatee, during the life-time of the testator, is an ademption or destruction of the legacy. As a matter of course, this "delivery" must be with intent, by the testator, to part, then, irrevocably with his own dominion and ownership of the property, and to pass it into the legatee. We think the Court ought to have left the facts of this transaction to a jury, charging them as to the law. If, during his life, the testator had delivered over the Alatoona creek place, in Cobb county, to Charles C. Clayton, with intent then and there to pass the right and

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dominion of it, irrevocably, out of himself to Charles C., then it passed to him as a gift, and not as a legacy, under this will.

Judgment reversed.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH,
plaintiff in error, *vs.* MILES D. CULLENS AND WIFE,
defendants in error.

A municipal corporation, the owner of a market, the stalls of which it rents, is bound to keep the pavement in front of the stalls in a safe condition, and if a citizen of the corporation is injured through neglect of this duty, by the officers of the corporation, the corporation is liable to the extent of the injury received.

Case. Motion for new trial. Decided by Judge FLEMING. Chatham Superior Court. May Term, 1867.

Miles D. Cullens and his wife brought an action on the case against said corporation, to recover damages, because said wife had been injured by falling into a hole or inequality in the pavement of the public market of said city.

The evidence in the case was substantially as follows:

LEWIS J. B. FAIRCHILD, testified that he was in the market on the day of the accident; there were a great many people there, and the place was one much frequented; Mrs. Ann M. Cullens was next in turn, after himself, to be served; and after being served, in turning, fell, from stepping into the hole; the hole was on the south side of the market, in the pavement between the market-house and the bench, about opposite to Rutherford's store; unless a person was very careful, he would have been apt to have fallen into that hole; witness lifted her up, senseless; hole would have been concealed by the crowd; witness came near falling into it, himself; accident happened early in January, 1866. On cross-examination, witness stated that hole may have been two feet across. On direct examination resumed, witness

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and that the same morning was the first time he noticed the hole; and he noticed it because he came near falling into it before the accident to Mrs. Cullens.

The plaintiff next read the testimony of Mrs. MARY E. SMITH, taken by deposition, as follows: She did not know the plaintiffs; was in the market of the city of Savannah, on January 6th, 1866, and did see a lady fall into a hole in the pavement of the market; did not know, of her own knowledge, that it was Mrs. Cullens, but was so informed; the hole was in that part of the market which is on Congress street, about opposite Rutherford's store, and inside of the railing; the hole was quite large, nearly a yard one way, and a little less the other; the lady was buying some sausages at a stall or outside bench, with her back to the hole; as she had placed these in the basket, and was turning away from the stall, she fell in the hole. Witness did not know, from all she could see, that the lady was guilty of negligence; it was a hole of irregular shape, quite deep, and dangerous to persons purchasing in that part of the market; that part of the market was often crowded with purchasers; the lady could not stand alone or bear her weight on her feet; they had to give her a seat until a carriage came and took her away; she was lifted up and carried by hand to the carriage; she could not walk at all. Witness could not state the exact nature of the injury Mrs. Cullens received, but she appeared to be in very great pain.

On cross-examination, this witness deposed that she did not think the lady was careless or negligent, because the hole was near the stall, and a person buying as she was, with others around her, at the stall or bench, could not well see and avoid the hole without exercising very great care; and persons buying goods in the market do not keep their eyes and attention fixed on where they are walking. Witness was looking at the lady when the accident was about to happen, and was making change for the sausages she had bought; and she fell just as she turned away from the bench; did not remember ever to have seen her before; a person walking along towards the hole could see it plainly,

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unless the place was crowded ; she remembered the day and month from the fact that her husband was taken sick the day before, and that on that day she had to employ some one in his place to assist her. The hole had been there a long time ; how long she did not know.

WILLIAM MOREL, sworn on same side, testified that he saw Mrs. Cullens in bed, after the accident, suffering great agony ; break in the pavement had been there a long time, and witness regarded it as dangerous ; he had nearly fallen into it himself, and several times spoke of it as a dangerous place, and said that somebody would fall into it and hurt himself ; Mrs. Cullens was the life and soul of her family ; hole, of which he spoke, was near the bench outside the market-house, partly under and partly outside said bench. On cross-examination, this witness testified that the hole was not repaired until Mr. Brunner came into office as clerk of the market ; it was about the size of two chairs put together ; about six inches deep on one side and four inches on the other ; he thought Mrs. Cullens was about fifty-eight years old ; city had been in charge of the United States military authorities from 21st December, 1864, to November, 1865.

ISAAC BRUNNER, on the same side, testified that he was the present clerk of the market ; that the hole was pointed out to him by the city marshal, Mr. Wayne ; and that he had it repaired after he went into office as clerk, which was on the 12th January, 1866 ; the hole was from four to six inches deep ; he had never noticed it before ; supposed the cost of repairing it was not over a dollar and a half or two dollars. On cross-examination, stated his belief that the hole was about a foot square, and appeared to have been occasioned by the removal of a stone. The city was then, generally, in a bad condition, and much money had been spent in repairing afterwards. On direct examination resumed, he stated that the hole was under the corner of the bench.

The depositions of Dr. JAMES S. MOREL, on the same side, were as follows : That he was a doctor of medicine, and had been a practitioner for thirty-four years ; was called to see and professionally attend Mrs. Cullens, the plaintiff ;

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on her complaining of great pain in her hip, and the symptoms, declared a fracture of the neck of the thigh bone within the capsular ligament; attended her for a month or more; the charge was one hundred dollars; her condition had been one of pain, and she would probably be a cripple for life; with the advance of life, her condition would be attended with great inconvenience to herself and to her friends; had known Mrs. Cullens for many years; she was active in her habits, and the main stay of her family; and the accident which had deprived her of the use of her limbs had seriously injured her economical interests. Of her then present health he had nothing to say, except that she was unable to walk without artificial aid. On cross-examination, he stated that Mrs. Cullens was more than fifty years of age, and that bones were easily broken at that time of life, and that slight causes could sometimes produce a fracture.

MILES H. CULLENS, son of plaintiffs, on same side, testified that he knew nothing, personally, of the accident; but that, for six months after it, his mother was not out of her room; and that she was still suffering; she had, before the accident, been a person of active business habits, but, since, had been able to do nothing; she got about her room with crutches; she had no use of her limb, could not raise herself without aid, and would probably never recover her powers. On cross-examination, he stated he did not know his mother's exact age, but believed Mr. Morel had stated it about correctly. Did not know his mother's habits in reference to market; but that she had been to the market four or five times just before the accident.

By consent, plaintiffs then introduced statement of LYDE BODWIN, formerly city marshal, to the effect that, from the list of market stalls, he, as city marshal, had, in the month of December, 1865, paid into the city treasury one thousand dollars.

RICHARD T. GIBSON, on same side, testified that he was city treasurer from February, 1865, to the latter part of the same year. On the first of November, of that year, the city had in its treasury about sixteen hundred dollars; and, on

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the first of December, about two thousand dollars. During the month of December, the sum of about sixteen thousand dollars was paid in. The proceeds of rice turned over to the city by Gen. Sherman, seem to have been about thirty-seven thousand dollars when Dr. Arnold went out of office as mayor of Savannah. The money, known as the rice fund, had been used in keeping up the city stores for support of the poor. On the cross-examination, he testified that the city was much out of repair when it was turned over by the military to the civil authorities; and the city authorities did the most important works of repair as soon as they could, including repairs of jail and guard house. Gen. Sherman came in on 21st December, 1864; and the city was not turned over to the civil authorities until the first of November, 1865. Taxes were laid, collected and expended by the military during that time. The city was in bad condition when turned over by the military; and the expenses for the city police and other matters of the restored civil government, were heavy.

Plaintiffs having here closed their case, defendant introduced the following evidence:

JOHN R. JOHNSON, elected an alderman of the city on the first Wednesday of December, 1865, testified that, on the Monday thereafter, he was appointed chairman of the market committee, and that the market was then in bad condition, so far as respected the stalls and conveniences for selling. Pavements in and around the market were in fair condition. He had to borrow scales to do weighing. Repairs were made as soon as they could be done with limited means at command. His impression was, that the hole shown him, as the one which occasioned the accident to Mrs. Cullens, was not under the bench, and was about a foot square and six inches deep. As chairman of the market committee, he economized as much as he could, owing to the condition of the finances of the city. The hole in the pavement, above referred to, was not repaired until Mr. Brunner came in as clerk of the market; would not have noticed the hole if his attention had not been called to it.

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fendant then introduced, as a witness, EDWARD C. ANDERSON, mayor of the city of Savannah, who testified that he was elected mayor of the city on the first Wednesday in November, 1865, under an ordinance of the Convention of Georgia, and had, under that and a subsequent election, been re-elected to the (then) present time. On entering upon his official duties, in the month of December, 1865, he found the city in a chaotic condition, and without money to make repairs as much more important than repairs at the market. Though the civil authorities of the city, in their efforts to improve the condition of things, were promptly seconded by the military, still there were embarrassments growing out of the new condition of affairs. Until January or February, 1866, no system of repairs had been, or could be begun, on account of financial and other difficulties. The city was heavily in debt, on outstanding bonds and coupons, and many urgent necessities for repairs, had not yet (at the time of his testimony) been met, in consequence of the embarrassments of the city. Besides repairs on the jail and guardhouse, those considered most deserving of prompt attention, were the avenues to and from the wharves, for the purpose of inviting commerce to the city, and to enable merchandise to come to and from the shipping. The stones from those wharves had been removed during the war, for the purpose of making cribs in the river, in order to obstruct the approach of Federal vessels to the city. Witness here verified his official report as mayor, (with the city treasurer's report appended,) dated 1st October, 1866, and which was considered in evidence, as far as it might be used by either party. RICHARD D. ARNOLD, also introduced for the defence, testified that he was mayor of Savannah, from October, 1863, to the 1st of December, 1865. Military government prevailed in Savannah from 21st December, 1864, to 1st November, 1865, during which time the functions of municipal civil government in the city, so far as they were exercised, were exercised under the supervision of the military. The military laid, collected and expended the taxes. When he left the city government, in November, 1865, the city was in as bad repair as it could

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be; but the civil authorities were not to blame. No general system of repairs had been ordered, because the city had the means. Witness here verified his official report as mayor (with the city treasurer's report annexed,) dated 28th December, 1865, and which was considered in evidence, as far as it might be used by either party. The witness stated that, whilst, by the treasurer's report, there appeared to be in the treasury, on 1st December, 1865, a balance of only \$209, yet that, between that time and the said 28th December, 1865, there was an available cash balance of \$37,204, including the money paid into the treasury on account of the rice aforesaid. He stated that the rice matter had been turned over to a committee, which had faithfully discharged its duty, and, whilst he knew there was litigation pending between the private owners of rice and the city, yet he thought said litigation embraced only a comparatively small portion of the proceeds. Witness further stated, that he knew the plaintiffs, and that they had been living in Savannah for thirty or fifteen or twenty years; and further, that the bones of a son of Mrs. Cullens's age break easily; sometimes from a fall by a trip from a carpet. In November, 1865, he, as mayor of the city, issued a proclamation, requiring citizens to repair their side-walks; but the order was not generally enforced, owing to the poverty of the people. On the cross-examination, the witness testified to nothing not herein before stated as his testimony, except that the private owners of rice, or some of them, being dissatisfied with the compensation allowed by the city, had brought suit against the city.

EDWARD C. ANDERSON, re-called, testified that the money known as the rice money, never went into the current expenses of the city, and, after paying what might be due to the private owners, was considered a fund for the support of the poor.

It was agreed that the record of the suit in said Supreme Court, respecting the rice controversy, might be used in evidence; but it was not used by production of it before the Court or jury.

The case being closed, the same was argued by the re-

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counsel for the said plaintiffs and the said defendant; defendant's counsel contending and arguing that a municipal corporation was not liable to be impleaded, at the suit of an individual or individuals, for or on account of any matter, or thing set out in plaintiffs' action; that there was any thing on the face of the record in said cause, which created a legal liability, on the part of said corporation, to plaintiffs in said action; that, even if an individual might sue such municipal corporation, for or on account of any error, cause or thing set out in the declaration, still, that such suit would lie at the instance, or in behalf of a corporation of such municipal corporation, against said corporation—that said plaintiffs were not, in any event, entitled to damages, except on proof of gross negligence or neglect on the part of the defendant, and that there was no such proof in the cause; that, where the law creates a duty or charge, and the party is disabled to perform it, and has no remedy, then the law will excuse him, and that in said cause there was proof of such disability on the part of the defendant without its fault; that the plaintiffs could not, in any way, recover, unless Mrs. Cullens was, at the time of the accident, in the exercise of ordinary care; that the pleadings and proofs in said cause did not show any non-feasance, misfeasance, mal-feasance, injury, wrong or tort wrongfully committed or suffered by said defendant, in the premises, and created no cause of action; that, under the evidence in said cause, the said municipal corporation, the defendant, had a full discretion in determining what repairs in said city were necessary to be done or made by said defendant, according to its means and opportunities, and that the exercise of such discretion, as proved in said cause, was not, under the circumstances, the subject of complaint or cavil, after such discretion had been honestly exercised, and that the proofs showed it had been honestly exercised; that it was not only shown that the hole or break in the pavement was the result of defendant's neglect or negligence, but that it was shown, as a fair presumption, to have occurred during the military occupation and government of the city; and that the evi-

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dence conduced to show, and did show, the exercise by defendant of a legal discretion in the premises, not the subject of review, revision or control by a jury; and the counsel of said plaintiffs arguing against said propositions as not applicable to the facts and law of the case.

After argument had, the Court charged the jury, that, to entitle the plaintiffs to recover, Mrs. Cullens must have been in the exercise of ordinary care at the time of the accident; that a municipal corporation was liable to suit by a private individual in a cause like that before the Court, and that such suit might be maintained, against the defendant, by an inhabitant of the city of Savannah; that the facts of the case, including the amount of damages, were questions for the determination of the jury; that whilst it was true that a disability to perform a duty created by law, and not by contract, would, in general, excuse performance, yet intimated or suggested to the jury that this case might form an exception, not only because the public market of Savannah was a thoroughfare, but because the corporation derived a revenue therefrom. To which charge, (and omissions to charge, as hereinafter stated,) counsel for defendant excepted.

The jury returned a verdict for the plaintiffs, and assessed damages against the defendant in the sum of two thousand dollars.

Whereupon, counsel for said defendant moved for arrest of judgment in said cause on the following grounds:

1st. Because the defendant, a municipal corporation, is not liable or subject to be impleaded, at the suit of an individual or individuals, for or on account of any matter, cause or thing set forth in the petition or declaration of said plaintiffs.

2. Because there is not anything on the face of the record in said cause, which shows a legal liability, on the part of said defendant, to the plaintiffs in said cause.

And, failing the motion in arrest of judgment on either of said grounds, then for a new trial in said cause, on the following grounds:

1st. Because, even if an individual or individuals may implead such municipal corporation, for or on account of any

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cause or thing set out in said plaintiffs' said petition
ration; still, no such suit lies, at the instance or in
of a corporator or of corporators of such corporation,
such municipal corporation.

because the Judge erred in not charging the jury, on
nt presented by defendant's counsel, to-wit: that
is were not, in any event, entitled to damages, except
f of gross negligence or neglect on the part of the
nt.

because the Judge, whilst admitting, in his charge
ary, that disability to perform a duty created by law,
by contract, would excuse performance; yet, inti-
r suggested to the jury, that this case might form an
on, not only because the public market of Savannah
boroughfare, but because the corporation derived a
therefrom.

Because the pleadings and proofs in said cause did
v any non-feasance, mis-feasance, mal-feasance, injury,
or tort, wrongfully committed or suffered by said
nt, in the premises; and showed no cause of action.

Because the aforesaid intimations or suggestions of
urt to the jury, in respect to the supposed duty of
defendant, as to the repair of said public market,
oneous and illegal.

Because the said charge was not only erroneous in
ters herein before stated, but also in that the Judge
to charge the jury, that, under the evidence in said
aid defendant had a legal discretion in determining
pairs in said city were most necessary to be done or
v said defendant, according to its means and opportu-
and that the exercise of such discretion was not the
of complaint or cavil, after such legal discretion had
nestly exercised.

Because said charge was contrary to the law of said

Because said charge was against the evidence in said

Because the verdict of the jury was against the evi-

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dence in said cause, not only because it was not shown that the hole or break in the pavement was the result of defendant's neglect or negligence, but that it was shown, by fair presumption, to have occurred during the military occupation and government of the city; and because the evidence conduced to show, and did show, the exercise by defendant of a legal discretion, in the premises, not the subject of review, revision or control by a jury in said Court; and because said verdict was against the weight of evidence in said cause.

10th. Because the verdict of the jury was against the law of said cause; especially in the matters and for the reasons herein before indicated.

The Judge having heard argument in vacation upon said motions and taken time to consider, in May, 1868, filed in office his refusal either to arrest the judgment or to grant a new trial.

The corporation now assigns as error said refusal, upon the grounds stated in the motion aforesaid and upon the further grounds, as follows: "11th. Said Judge erred in deciding that there was any peculiar duty or responsibility resting on the defendant in respect to repairs in, on, or around said public market, over and above other repairs in said city, shown by the evidence to have been of most importance, and when the evidence showed that, without its fault, defendant had not the means to make all necessary and proper repairs of the thoroughfares and public places in said city.

12th. The said Judge erred in deciding that, under the law and evidence in said cause, the defendant had not the legal discretion, without the right of review or control by a court or jury, to determine, under the actual circumstances proved on said trial, what repairs said corporation should first make in said city, with the limited means at its command; and especially, when there was no proof showing that the want of repairs in or around said public market or the pavements thereof, was caused or occasioned by said corporation or any of its servants or agents, or was known to it or them or any of them; and in further deciding that the

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enting of stalls in said market, or the requirement that certain articles of food should be sold only thereat, raised an implied contract that said market had no defect in the pavement thereof." (The Judge's written reasons filed in office are the decisions alluded to in said grounds.")

EDW. J. HARDEN, (represented by the Reporter,) made the following citations: On the motion in arrest of judgment, 2 Hill, (S. C.,) 571; 3 Peters, 409, 2 Tenn., 667; 9 Mass., 247; Mayor, &c., vs. Henley, 1 Bing., N. C., 222; (27 E. C. L., 336,) 3 Hill, (N. Y.), 612. As to whether a corporator could maintain the action; A. & A. on Corp., secs. 97, 390, 629, 630; 1st Gr. Ev., sec. 331; 1st Chitty's Pl., (1833), 46; 18 Howard, 344, (note). To show that there must be gross neglect: Daniels vs. Potter *et al.*, 4 C. & P., 262; (19 E. C. L., 506), and 5 Sandford, (N. Y.), 303-4. As to inability to repair being a good excuse: Broom's L. M., 118; 8 Tenn. R., 267; Story on B., sec. 56; 2d Parsons on C., 672-3; 2 Kernan, (N. Y.), 99. As to their discretion, etc.: W. on Corp., 313, sec. 817; 4 M. & S., 27-29; 3 Howard, 98; 12 Peck, 193; 1 Denio, 595; 16 Peck, 190; 7 Ga. R., 139; 11 Ga. R., 221.

THOS. E. LOYD, for defendant in error, replied: Plaintiff in error owns the market; Dawson's Compilation, 427. None can sell certain meats elsewhere; Henry's Ordinances, 336. Therefore, they are liable for damage caused by their neglecting to repair, etc.: 2 Black's S. C. R., 422, 490; 16 N. Y. R., 158; 17 N. Y. R., 104; 5 Sandford's S. C. R., 289; 3 Hill, 612; 1 Selden, 369; Tort will lie against a corporation, *Mayor of Columbus vs. Goetchins*, 7 Ga. R., 139; *Bishop & Parsons vs. Macon*, 7 Ga. R., 200, *et seq.*

McCAY, J.

Although there may be found *dicta* that a corporation cannot be sued for a tort, yet the authorities in support of the contrary doctrine are numerous and conclusive. Angel & Ames, sec. 382-385. Nor does a municipal corporation form any exception. The case of the Mayor of Lynn vs. Turner,

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Cowper, &c., was against a municipal corporation for failing to repair and clean out a creek; indeed the old cases of suits against corporations for *torts* (that is, actions on the case for negligence,) are almost all against *municipal* corporations. See the cases cited in 16 East., 6.

If the wrong be a *mere* breach of public duty, and no damage to any one, no action lies. 4th Maule & S., 27.

As corporations almost always act by their agents, and as they, like private persons, are not liable for the willful trespasses of their agents, which they have not authorized or adopted, and which are not done in the course of the agent's performance of his duty, but few cases are found of actions of trespass against corporations for actual wrongs done, but the books are full of actions on the case against both public and private corporations, for damages caused by a *failure* of the corporation to perform some duty cast upon it by law. Chesnut, Hill & Co., vs. Rutter, 4 Ser. & Rawle, 6.

2d. There is no doubt, also, that one of the corporators may be the plaintiff in a suit against a corporation. The corporation is itself a *quasi* person, and even as respects one of its members, has a separate individuality. 2 Bay, 109; 5 Adol & Ellis, 866.

We think, therefore, that the motion in arrest of judgment was rightly overruled.

3. That there is a general duty upon the city of Savannah to keep its streets in repair, is, we believe, not questioned. Its defence, or rather its excuse, *as to the streets*, in this case, was a strong one. The law does not require impossibilities, and there is force in the argument, that when *all* could not be done at once, it was no breach of duty not to select, as the first to be repaired, any particular spot. On the other hand, the market was the *property* of the corporation, from which it derived a revenue, in the way of rents. Why was it not just as much bound to keep *that safe* as a merchant is the floor of his store? To keep the market in a safe condition, it being property, and used by the city for its revenues, was a *private* duty. It was the duty of a property holder, and the city stands, in this respect, upon the same footing as an

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individual. It must use its own, so as not to hurt its neighbors.

Whatever was the condition of the streets, it was its duty not to have a trap, on its *private property*, by which a citizen was injured. We hold, therefore, that the Judge was right in his charge to the jury; that the market stood on a different footing from the streets, and that the excuse presented did not apply to it.

Judgment affirmed.

WM. D. GREEN *et al.*, plaintiffs in error, *vs.* JOHN JONES *et al.*, defendants in error.

1. Confederate currency paid and credited on a note for its nominal value. extinguished the note to the amount of that nominal value.
2. In suits upon Confederate contracts, where there has been no rule of law violated, nor manifest injustice done, this Court will not control the discretion of the Court below, in refusing to grant a new trial.

Scaling Ordinance. Motion for new trial. Decided by Judge J. M. CLARK. Lee Superior Court. September Term, 1868.

This action was by the payees against the makers of the following paper :

\$68,750 00. •

DECEMBER, 1864.

By the first day of January next, I promise W. D. Green, Philip West, W. Liggon, Elizabeth Whitrett, and P. S. Hall, or bearer, the sum of sixty-eight thousand seven hundred and fifty dollars, in Confederate currency, and should the currency depreciate its present value, it is to be estimated at its present value, and

"JOHN JONES, by Willis A. Jones

"W. A. JONES, Sec.

"C. B. CALLOWAY, Sec."

When it were indorsed the following credits:

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“Rec’d on the within note thirty-five thousand one hundred and ninety-seven 50-100 dollars. Dec. 20th, 1864. PHILIP WEST.”

“Rec’d on the within note (\$30,000 00) thirty thousand dollars. This the 25th day of February, 1865. PHILIP WEST.”

The effort of defendants on the trial was to scale the same by the Ordinance of 1865.

The plaintiffs read in evidence said paper, shewed by Philip West, that it was given between the first and the tenth of December, 1864, for a settlement of lands on Pachitla creek, Calhoun county, Georgia, containing thirteen hundred and seventy-five acres, which was worth \$10 00 or \$12 00 per acre before the war, has been worth that much since, and at the time of trial, was worth, he supposed, \$6 00 or \$7 00 per acre; that said credits were for Confederate currency, paid to himself, the amounts being shewn by the credits. Another witness, in behalf of plaintiffs, testified about as did West, as to the value of said land. Two of the defendants testified that said land was not then worth over \$2 00 per acre; that the fencing was bad, etc., and that they would take that price for their part of it. With these agreed another witness. The defendants, besides the evidence aforesaid, shewed that the word “Confederate” was stricken out of the original paper, so that it should be payable in either State or Confederate currency, and that \$1 00 in gold, was worth, in Confederate currency, \$32 00 on the 1st, \$35 00 on the 15th, and \$50 00 on the 30th of December, 1864, and \$60 00 on the 1st, and \$65 00 on the 15th of January, 1865, \$50 00 on the 1st, and \$46 00 on the 15th of February, 1865, and \$55 00 on the 1st of March, 1865. The plaintiffs’ attorneys requested the Court to charge the jury thus: “You will find out, from the proof, the value of the several sums of money paid on the note, on the day that the note was made, and deduct therefrom the face of the note, if there was a decline in the value of Confederate money between the several periods, in accordance with the contract expressed in the note.” And further, that they could not take the value of the land then, but make up their verdict

basis of its value at the time the contract was made. Court did not so charge, but charged :

The credits upon the note, are an absolute and full discharge of the debt, to the amount of the credits.

(Was a reiteration of first.)

If you believe the note was payable in Confederate money, you can, in determining the amount of the balance due, take either the value of the land for which it was given, or the value of the Confederate money. Either mode is open to you. You can add to your finding, if you think proper, the difference between gold and the present currency.

In coming to a conclusion, as to the mode of arriving at the balance due, that is, whether you will take the land or the value of Confederate currency, the basis of your calculation, you may inquire as to the intention of the parties, as to the mode in which the same was to be paid. Either mode, of land or the currency, is open to you. The whole question is submitted to your consideration, and you may consider the balance due of the land or the currency *at any time*.

The verdict was for \$219 02, with interest from 25th of May, 1865, and costs of suit, against said defendants. Upon, plaintiffs moved for a new trial, averring that the Court erred in refusing to charge as requested, and in charging, as specified above, and that the verdict was contrary to the evidence, etc. The Court refused a new trial, and this is assigned as error.

I. WEST, C. T. GOODE, VASON & DAVIS, for plaintiffs in error.

A. HAWKINS, KIMBROUGH, for defendants in error.

ARNER, J.

The error assigned to the judgment of the Court below is, refusal to grant a new trial upon the several grounds stated in the motion therefor. The charge of the Court to the jury, in relation to the credits on the note, is in accordance with the ruling of this Court, in *Mordecai vs. Stewart*, 12 Rep., 126.

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Upon looking through the record in this case, we find no error that will authorize this Court, according to its repeated adjudications in this class of cases, to control the discretion of the Court below in refusing to grant a new trial. Let the judgment of the Court below be affirmed.

CUTTS & JOHNSON *et al.*, plaintiffs in error, vs. N. A. HARDEE, survivor, defendant in error.

BROWN, C. J.

1. While the courts have the power, and it is their duty, when a proper case is made, to declare Acts of the Legislature unconstitutional and void, such Acts are always presumed to be constitutional, and the authority of the courts to declare them void should be exercised with great caution, and should never be resorted to but in clear and urgent cases.
2. That provision of the Constitution of the United States which denies to a State the right to pass any law impairing the obligation of contracts, does not interfere with the right of a State to pass laws acting upon the remedy.
3. There is a plain distinction between the *obligation* of a contract and the *remedy* for its enforcement, and while the Legislature may not impair the obligation of the contract, it has the undoubted right to change, modify or vary the nature and extent of the remedy, (provided a *substantive* remedy is always left to the creditor, so long as the State does not deny to her courts jurisdiction of contracts,) and to prescribe such rules of procedure and of evidence as may, in its wisdom, seem best suited to advance the administration of justice in the courts.
4. That part of the Act of the Legislature passed at its late session, entitled "An Act for the relief of debtors, and to authorize the adjustment of debts upon principles of equity," which provides for a change of the rules of evidence, (under which this case originated,) is not unconstitutional, though it may permit evidence to go to the jury which has not heretofore been allowed, and which the courts may consider irrelevant and improper. It is the province of the Legislature to prescribe the rules of evidence and of the courts to administer them.
5. It is no objection to the constitutionality of this Act that it authorizes the jury to reduce the amount of the debt sued for, according to the equities of the case, as this is done every day in court, in case of partial failure of consideration, and the like. This must be done, however, according to the real equities between the parties, and not according to the caprice of the jury, and when so done, it neither impairs the obligation of the contract nor works injustice to the parties litigant.

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If this should be seized upon by the jury, and used as a pretext for reducing the debt, otherwise than the equities between the parties permit, it will be the duty of the Court to set aside the verdict when that fact is made plainly to appear.

In this case, the obligation of the contract was not in any degree impaired by the filing of the pleas by the defendant, to which objection was made, as a foundation for the introduction of evidence under the statute, and the evidence should have been received, and if the jury had made an improper use of it, or found contrary to law and evidence, it would then have been time enough for the Court to interfere and set aside the verdict.

When the statute authorizes certain facts to be given in evidence, a demurrer to a plea which lays the foundation for such evidence, should not be sustained. The old rules of pleading in such case must yield to the statute.

McCAY, J., concurring.

It is not to be presumed that the Legislature intends to violate the Constitution of the United States, and when words are used in an Act, they ought to be construed, if possible, so as to make the Act consistent with that Constitution.

The consideration of a contract, and whether there has been a tender of the whole or any part of a debt sued on, and if the debt was not paid, that it was the creditor's fault, are not only in all cases fit matters for proof, but are often of great importance in arriving at proper conclusions as to the true rights of the parties in the matters before the Court. Nor can such evidence, in any proper use of it, at all tend to impair the obligation of the contract sued on.

If the property, upon which the credit was given in the contract, has been lost, or rendered worthless, it is competent for the Legislature to permit the defendant, when the contract is sued upon, to show by whose fault that property was lost or destroyed, and the value of it at the time of the contract, and at the time of the loss.

That clause of the Act of the Legislature under discussion, which authorizes the jury, in suits upon certain contracts, to reduce the *debt* sued upon, according to the equities of each case, was not intended to permit them to impair the obligation of the contract of the parties. The equity and justice there meant, is that fair and honest duty which each owes to the other, under the contract, to be gathered from the whole transaction as it actually occurred between them, and from the facts creating legal or equitable obligations, which have happened between them since the date of the contract.

The obligation of a contract cannot be impaired by the Legislature of this State, under the guise of changing the rules of evidence, or altering the mode of procedure. Nor can the Legislature authorize a court or jury so to adjudicate between the parties to a contract, as to alter its obligation, as it was, in fact, entered into.

Consistently with these principles, a State Legislature may alter the

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rules of evidence, and change the mode of proceeding in the State Courts. Nor is it the province of this Court to declare an Act of the Legislature void, because it permits the introduction of evidence, which, in the opinion of the Court, may be irrelevant to the issue, and calculated to distract or mislead the minds of the jury.

7. The Act of the Legislature in 1868, so far as it allows the defendant, in all suits upon the contracts dated before the first of June, 1865, to give in evidence the consideration of the debt sued on, whether any tender has been made, and if the debt was not paid, whose fault it was, what property the credit was given upon, and if that property has been lost, by whose fault it was, and so far as it authorizes the jury in such cases, to reduce the debt sued on, according to the principles of equity, is not, if construed according to the well established rules for the construction of statutes, in violation of that clause of the Constitution of the United States which prohibits any State from passing a law impairing the obligation of contracts.
8. Should any Court of this State give to the Act in question, in any case tried before it, such a construction as would impair the obligation of the contract under investigation, this Court, in a proper case made, will correct the error.
9. A plea filed, setting up any facts which, by express enactment of the Legislature, are permitted to be given in evidence, is not demurrable.

WARNER, J., dissenting.

This was an action brought by the plaintiff against the defendants, on a promissory note, for the sum of \$5,229 00, dated January 22, 1861, and due forty-five days after date.

The defendant, Stewart, filed a plea, setting up, by way of defence to the note, certain facts, as provided by the provisions of the first section of the Act of 1868, "for the relief of debtors, and to authorize the adjustment of debts upon principles of equity." The plaintiff demurred to the defendant's plea, and the Court below sustained the demurrer, and the defendant excepted.

The decision of this question necessarily involves the constitutionality of the Act of 1868. The first section of that Act provides, "that, in all suits which shall be brought for the recovery of debts, in any of the Courts of this State, or upon contracts for the payment of money, made prior to the 1st of June, 1865, (except for the hire or sale of slaves), it shall be lawful for the parties, in all such cases, to give in evidence before the jury impaneled to try the same, the consideration of the debt or contract which may be the subject of the suit, the amount and value of the property owned by the defendant at the time the debt was contracted, or the contract entered into, to show upon the faith of what property, credit was given to him, and what tender or tenders of payment he made to the creditor at any time, and that the non-payment of the debt or debts, was owing to the refusal of the creditor to receive the money tendered or offered to be tendered, the destruction or loss of the property upon the faith of which the credit

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was given, and how and in what manner the property was destroyed or lost, and by whose default, and in all such cases the *juries*, which try the same, shall have power to reduce the amount of the debt or debts sued for, according to the equities of each case, and render such verdicts as to them shall appear just and equitable." This Act of the Legislature, in my judgment, necessarily impairs the obligation of the contract, as it existed under the law at the time the contract was made, and it makes no difference whether that result is produced under the name of a remedy, or under the pretext of regulating the admissibility of evidence. Is the contract and the obligation to perform it as valuable now, under the provisions of the Act of 1868, as it was under the law applicable to the contract at the time it was made?

Relief-law. Demurrer. Decided by Judge J. M. CLARK.
Sumter Superior Court. October Term, 1868.

Cutts & Johnson and James Stewart, on the 22d of January, 1861, gave their single bill or bond for \$5,229 01, payable to the order of N. A. Hardee & Co., forty-five days after date, and also an agreement to pay expenses if suit had to be brought on it. Suit was brought thereon, in March, 1861. One of the plaintiffs died, and the case proceeded in the name of the survivor. The cause was pending in October, 1868, and then Stewart plead that "said note was made prior to the 1st day of June, 1865; that the consideration for the same, was a security of A. S. Cutts only; that, at the time said note was made, the amount and value of the property owned by the defendant, was about \$200,000 00, and that on or about the — day of ———, 18—, said defendant tendered, or offered to tender, payment of said draft in currency, then in circulation generally, and which said plaintiff refused to receive in payment thereof; said property was lost or destroyed in the following manner, to-wit: one hundred negroes, worth \$100,000 00, were manumitted, and the property therein destroyed; he owned about five thousand acres of land in Sumter and Schley counties, then of the value of about \$45,000 00, and not worth more now than \$100 00 or \$8,000 00; he sold the most valuable place; he sold it for \$5,000 00, in Confederate money, most of which is now on hand, and worthless; he had no interest in the consideration of said note; said property was destroyed

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by fire, etc.; and further, "that by the Constitution of the State of Georgia, this Court has no jurisdiction of this case."

The plea was demurred to, and the demurrer was sustained. This is assigned as error.

W. A. HAWKINS, LYON & DEGRAFFENRIED, VASON & DAVIS, for plaintiffs in error.

J. J. SCARBOROUGH, C. T. GOODE, for defendant in error.

BROWN, C. J.

The first section of the Act of the Legislature, passed at the session of 1868, entitled, "An Act for the relief of debtors, and to authorize the adjustment of debts upon principles of equity," is in these words:

"That in all suits which shall be brought for the recovery of debts, in any of the Courts of this State, or upon contract for the payment of money, made prior to the first day of June, 1865, (except for the sale or hire of slaves,) it shall and may be lawful for the parties, in all such cases, to give in evidence before the jury impaneled to try the same, the consideration of the debt or contract which may be the subject of the suit, the amount and value of the property owned by the debtor at the time the debt was contracted, or the contract entered into, to show upon the faith of what property the credit was given to him, and what tender or tenders of payment he made to the creditor, at any time, and that the non-payment of the debt or debts was owing to the refusal of the creditor to receive the money tendered, or offered to be tendered; the destruction or loss of the property upon the faith of which the credit was given; and how and in what manner the property was destroyed or lost, and by whom default; and in all such cases, the juries which try the same, shall have power to reduce the amount of the debt or debts sued for, according to the equities of each case, and render such verdicts as to them shall appear just and equitable."

The pleas filed in this case were such as were necessary to

let in the evidence on the trial, which is authorized by the above section of the Act. Counsel for plaintiff demurred to the pleas, on the ground that the Act was unconstitutional and void. The Court sustained the demurrer, and ordered the pleas to be stricken from the record, and that decision is assigned as error.

1. It can not be questioned that the Courts have the power to declare Acts of the Legislature unconstitutional, null and void; and to refuse, on that ground, to enforce them. While this is a necessary power, it is one that should be exercised with great caution. Solemn Acts of the Legislature are always presumed to be constitutional and binding, and should never be set aside by the Courts, except in clear and urgent cases. If the Court entertains doubts, the decision should be in favor of the validity of the Act. 12 Wheat., 270. 16 Ga. R., 102.

2. It is contended that this section of this Act violates that provision of the Constitution of the United States which denies to any State the power to pass any law impairing the obligation of contracts. But that provision of the Constitution does not prohibit the passage of laws, by the States, acting upon the remedy.

3. The distinction between the obligation of a contract and the remedy for its enforcement, is well established by the authorities; and while the Legislature has no right to impair the obligation of the contract, it has the undoubted right to change, modify, or vary the nature and extent of the remedy, provided a substantive remedy is left to the creditor. 12 Wheat., 285, 349-50; 4 Wheat., 200, 201; 1 Howard's Reps., 316; Story on the Const., sec. 1385; 3 Peters' Reps., 310; 5 Pet., 456; 13 Pet., 312; 23 Maine Reps., 318, 322; 1 Maine, 109; 2 Fairf., 284; 6 Pick., 501; 1 Cowen, 501; 1 Ala., Reps., 404; 9 Ala., 713; 1 Texas, 598, 600; 4 Watts & Serg., 220; 5 How. Miss. Reports, 285; 1 Kernan's Reps., 3; 3 Denio, 274; 4 Gilmer, 221; 1 Morris, 70; 7 Geo. R., 103; 9 Geo. R., 258; 12 Geo. R., 437; 13 Geo. R., 306; 14 Geo. R., 151; 28 Geo. R., 345; 37 Geo. R., 440, and

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numerous other authorities which might be cited sustaining the same doctrine.

So long as the State undertakes to furnish remedies, she may vary or modify them at pleasure, if she does not destroy their substantive character. But it does not necessarily follow that a State is bound to furnish any remedy at all, for the enforcement of contracts. If, in the organization of her government, she should determine to establish the cash system in all trade and commerce, and should deny to her courts jurisdiction over any executory contract for the payment of money, I know of no coercive power under our system of government to compel her to change her system, and establish Courts with jurisdiction over such questions. Nor would the *obligation* of the contract be impaired by such a refusal on the part of a State to enforce the contract, as the injured party, in case the contract were not declared illegal by the laws of the State where made, would have his right of action wherever he might find the other party or his property, within the jurisdiction of a State whose laws afford remedies for the enforcement of such contracts.

The late Chief Justice Marshall, who was certainly one of the ablest jurists of any age, while he characterizes the conduct of a State, which would refuse to afford remedies to enforce contracts, in very strong terms of reproach, admits the power of the State to withhold all remedy, and denies that there is any coercive power over her, to compel her to enforce the performance of contracts. In *Ogden vs. Saunders*, 12 Wheat., 350-1-2, he says: "Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent governments, over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the *obligation* is distinct from the *remedy*, and it would seem to follow, that the law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed.

A failure in the performance of this duty, subjects the government to the just reproach of the world. *But the Constitution has not undertaken to enforce its performance.* That instrument treats the States with the respect which is due to intelligent beings, understanding their duties, and willing to perform them ; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of *restraint*, not *coercion*. It prohibits the States from passing any law impairing the obligation of contracts ; *it does not enjoin them to enforce contracts.* Should a State be sufficiently insane to shut up or abolish its Courts, and thereby *withhold all remedy*, would this annihilation of remedy annihilate the obligation, also, of contracts ? We know it would not. If the debtor should come within the jurisdiction of any Court of another State, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This can not be ascribed to a renewal of the obligation ; for passing the line of a State can not re-create an obligation, which was extinguished. It must be the original obligation, derived from the agreement of the parties, and which exists **UNIMPAIRED**, though the remedy was withdrawn." "The Constitution contemplates *restraint* as to the *obligation* of contracts, not as to the application of *remedy*." So, if a State shall not merely modify or withhold a particular remedy, but shall apply it in such manner as to *extinguish the obligation* without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that *remedy* could not be regulated without regulating *obligations*."

"If it leaves the obligation untouched, but *withholds the remedy*, or affords one which is merely *nominal*, it is like all other cases of mis-government, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy."

These quotations from this great luminary of legal science, who was never accused of too great partiality for the rights of the States, show clearly his opinion, not only that the *obligation* and the *remedy* are distinct, but that a State has

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the power to regulate the remedy at pleasure, and that a denial of all remedy in *her* Courts does not "impair" the *obligation* of the contract.

I am now discussing the question of the power of the States to vary, modify, change, or withhold remedies; and not the justice or propriety of such action on their part. If the state of things had existed when Chief Justice Marshall delivered the above opinion, which now exists in Georgia; if two-thirds of the whole property of the State, including over \$300,000,000 00, of one particular kind of property, had been destroyed by the fortunes of war and the action of government, and the State had, in such an emergency, before her people had time to recover from the shock, attempted, by the exercise of *all* her powers, to save something of the wreck, and to relieve them from the payment of debts contracted for property destroyed by the government, which must have been a total loss to the vendor, if he had retained it; or, in case of the destruction of the property on the faith of which debts were contracted, if she had attempted, by the fullest exercise of her powers, to compel an equitable distribution of the losses among debtors and creditors, the learned Chief Justice might have taken a very different view of the *propriety* of her conduct, while acknowledging the amplitude of her *power* to modify, change, or withhold, remedies.

It is claimed, however, that the Supreme Court of the United States, in the case of McCracken vs. Hayward, 2 How., 608, has ruled that the law of the State, in existence at the time the contract is made, becomes part of the contract, and that the Legislature has no right to change that law, no matter whether it applies to the validity and construction of the contract or to the remedy, but, that the plaintiff is entitled to his remedy, under the law as it then existed. I am free to admit that there are expressions in the opinion delivered by Mr. Justice Baldwin, in that case, which seem to favor that construction. It is worthy of remark, that that case does not seem to have been very well considered by the Court, as there was no appearance by counsel on either side. A written argument was submitted for the plaintiff in error, in whose

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the decision was made; but nothing, whatever, was submitted for the defendant. Justice Catron observes, "I have no opinion whether the Statute of Illinois is constitutional or otherwise. The question raised on it, is one of the delicate and difficult of any ever presented to this; and as our decision affects the State Courts throughout their practice, I feel unwilling to form or express any opinion on so grave a question, unless it is presented in the undoubted form, and argued at the bar."

It is further to be observed, that it was not necessary to this extent to decide the question made by the record, before the Court.

The State of Illinois had not denied to her Courts jurisdiction of the class of cases then before the Court. But, when she undertook to furnish a remedy, she had enacted a law whereby property levied on to satisfy executions on debts contracted prior to the first of May, 1841, should be appraised by three house-holders, and have its value endorsed upon the writ, or upon a piece of paper thereunto attached, and signed by them; and a sale was forbidden, till two-thirds of the appraised value should be bid for the property. It is clear that this provision of the statute might defeat all remedies, while the State professed to furnish a remedy, as no sale could ever be made till two-thirds of the value placed upon the property by the appraisers, was bid, no matter how low, or how much above the true value, the appraisers might price the property. The substantive character of the remedy was destroyed by the statute, which proposed to take away the remedy, and the decision of the Court, declaring this remedy unconstitutional, was in harmony with the current of public opinion on this subject. The constitutionality of this Act was the only question presented for the consideration of the Court. They declared it unconstitutional, and, to that extent, their opinion is authority. But all that is said about the law is a remedy, entering into the contract, and forming part of the consideration. And with the most profound respect for that tribunal, and for the opinions of the able Judges who sat on the bench, I will add, it is against the current of

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authority, and in conflict with the opinions of many of the ablest Judges, including Chief Justice Marshall, who have adorned the position held by Mr. Justice Baldwin and his associates.

In commenting on the decision in this case, in 1 Kernan's Reps., 386, Judge Denio, of New York, says: "In the able and discriminating opinion of Chief Justice Taney, in the first case, (*Bronson vs. Kenzie*), the right to make such changes (in the remedy) is distinctly asserted; and, if the opinion in *McCracken vs. Hayward* held the contrary, it was unnecessary to go to that length, and the doctrine would be hostile to the principle of several prior cases, and an unwarrantable restriction upon the powers of the State governments."

The objection to the constitutionality of the Illinois Act rested upon the ground that the property might *never* bring two-thirds of the appraised value. This view is sustained by the decision in the case, *The United States vs. Conway, Hemp*, 313, in which it was ruled that a law which protects the debtor's property from sale on execution for *one year*, if two-thirds of the appraised value shall not be offered, does *not* impair the obligation of the contract.

The case of *Van Hoffman vs. The City of Quincy*, 4 Wallace, 535, when carefully examined, is found to contain *no* authority for the position I am controverting.

At the time the bonds in question were issued by the city, there were statutes of the State of Illinois authorizing the city to issue them, and authorizing and requiring the corporation to levy, from time to time, sufficient tax to pay the coupons and bonds as they become due. The Act of 1863 attempted to repeal the Acts authorizing and requiring the collection of sufficient tax to meet the payments as required by the terms of the contract. And the sole question presented for the consideration of the Supreme Court of the United States was, whether the Legislature of Illinois had power to repeal the statutes providing for taxation to pay the bonds, till they were satisfied? The Supreme Court held, that the issuing of the bonds under the statutes was a con-

act, and that an Act of the Legislature repealing these statutes, before the bonds were paid, impaired the obligation.

It will be observed, in this case, that the statutes themselves formed part of the contract, as it was under their express authority that the city issued the bonds, and their repeal amounted to a repudiation of the bonds. Well might the learned Judge who delivered the opinion say, that the laws which subsisted at the time and place of making the contract, *and where it was to be performed*, entered into and formed part of it. As applicable to the case before the Court, no one can question the correctness of this position.

The very illustrations given by the learned Judge show that he does not intend to lay down the broad proposition contended for, in this Court, that the law of the remedy existing at the time enters into the contract, and becomes part of it. Mr. Justice Swayne says: "Illustrations of the proposition are found in the obligation of the debtor to pay interest after the maturity of the debt, when the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice." These illustrations show what is meant by the general language used, and are not inconsistent with the position that the Legislature may pass laws acting upon the *remedy*, while it may not impair the *obligation* of the contract.

Indeed, the learned Judge distinctly admits this power in the Legislature. He says: "This has reference to legislation which affects the contract directly, and not indirectly, or only by consequence." Again he says: "They (the States) may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of household furniture. It is said, regulations of this description have always been considered, in every civilized community, as properly belonging to the *remedy*, to be exercised by every sovereignty according to its own views of policy and humanity. It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the con-

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tract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances."

Again, he adds: "If these doctrines were *res integrae*, the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy, or, to speak more accurately, between the remedy and the other parts of the contract, might, perhaps, well be doubted. But they rest in this Court, upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that, it is hard for the mind not to feel constrained to believe they are correct."

Here, then, the difference between *obligation* and *remedy* or between *contract* and *remedy*, is admitted in the fullest sense, as firmly established in the Supreme Court of the United States, too firmly established to be shaken; and the right of a State to *change* the *form* of the remedy, and otherwise to *modify* it, is distinctly conceded in the very case relied on in this Court, by those who deny this power in the Legislature, and contend that the law of the remedy in existence at the time the contract was made, enters into, and becomes part of it. The Supreme Court does not hesitate to admit that there is no definitely fixed line between *alterations* of a remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights; and that every case must be determined "upon its own circumstances." The admission, by that high tribunal of the right of the Legislature to *alter* or *modify* the law of remedy at all, is a conclusive admission that the law of remedy in existence at the time, is no part of the contract, and does not enter into it. If it did, the least change or modification of the law of the remedy, would, to that extent, impair the obligation of the contract.

But will this doctrine, that the law of the remedy as it exists at the time the contract is made, enters into and becomes part of it, which the plaintiff is entitled to have administered

in enforcing the performance of the contract, bear the test of critical examination? Can it be sustained upon principle or authority? I think not. When an attempt is made to reduce it to practice, its advocates, appalled by the mischief that would result from its enforcement, are driven to engraft upon it, so many exceptions, resting upon principles so absolutely in conflict with the principles upon which the rule is claimed to rest, that its force is destroyed, and the unsoundness of the position is demonstrated.

Take the case of the statute of limitations of a State, which bars an action on a promissory note after six years, and tell me, if the rule under consideration be a sound one, how it is that the Legislature may shorten the period to four years, or extend it to eight years, and compel parties to contracts then in existence, to conform to it as changed? If the law of the remedy, as it exists when the contract is made, enters into, and becomes part of it, the payee of the note stipulates that he shall be allowed six years after the note is due to bring his suit, and the maker agrees to it, and no change of the law, reducing it to four years, can bind the payee or holder of the note. On the other hand, if the rule be a sound one, the maker of the note stipulates when he makes the contract, that the holder shall be barred if he does not sue in six years, and any law of the State, extending the period to eight years, impairs the obligation of the contract, and is null and void. I need not cite authorities to prove that the Legislature, in the case supposed, has the power to limit the period to four years, or extend it to eight. It is universally admitted, in all the Courts. And why? Because, say the Courts, the statute of limitations acts upon the remedy; and the Legislature has the undoubted right to vary, alter, or modify the remedy at pleasure. How can this universally acknowledged rule of decision be sustained, if the law of the remedy, as it exists at the time the contract is made, enters into, and becomes part of it?

I will cite a single case, decided by the Supreme Court of the United States, *The Bank of Alabama vs. Dalton*, 9 Howard, 522, to show the extent to which this doctrine has been

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carried. The State of Mississippi passed a statute of limitations, in 1844, which barred *all* suits on judgments recovered within that State, after a lapse of seven years; and all suits on judgments *thereafter* rendered out of the State after six years, and all suits upon judgments obtained out of the State *before* the passage of the Act, within two years *after* the passage of the Act. Judgment was obtained by the plaintiff against the defendant, in Alabama, on the 7th of February, 1843. The defendant, afterwards, removed to Mississippi, where he arrived on the 10th day of November, 1846, more than two years after the date of the limitation Act above mentioned. Suit was commenced against him, on the judgment in the United States District Court, for the Northern District of Mississippi, on the day he arrived within that State.

The defendant pleaded the statute of limitations of Mississippi as his defence, to-wit: that the suit was not commenced within two years from the date of said Act. It was admitted that this was the first day he had been in Mississippi, or could have been sued there. The Supreme Court of the United States were unanimously of the opinion, and so ruled, that the statute of limitations of Mississippi governed the case; that it acted only upon the *remedy*, and violated no provision of the Constitution. The Court says: "In administering justice to enforce contracts and judgments, the States of this Union act independently of each other; and their Courts are governed by the laws and municipal regulations of the States where the remedy is sought, unless they are controlled by the Constitution of the United States, and the laws enacted under it. This the Court held was not so in this case. Here the plaintiff had lost his remedy, in Alabama, by the removal of the defendant from that State; and though he sued the first day the defendant resided in Mississippi, it was held that the laws of that State, which denied him any remedy, were not in violation of the Constitution. In other words, the Supreme Court of the United States has, in effect, held that the State might *destroy* the remedy within her jurisdiction, upon a judgment from another State, by

te of limitations, without impairing the obligation of contract.

gain, the law of the State, at the time the contract is made, authorizes imprisonment for debt. The debtor makes the contract with full knowledge that it is the right of the creditor, under the law governing the remedy then in existence, to arrest and imprison him in case of non-performance, until the debt is paid. The creditor knows this to be the law, and he remedies, and contracts with reference to it. Indeed, he may rest on this as his only reliable and effective remedy. He may know the character of the debtor, that he is wanting in principle, and that all his property is in money, bonds, or other choses in action, which cannot be reached by the levy-officer. But he knows it is his right, under the remedial provisions of the State, to arrest him on a *ca. sa.*, and imprison him till he delivers up his hidden treasure, which is ample for the satisfaction of the debt. Relying on this remedy he gives his credit, which he would not give if the remedy by imprisonment did not exist. Now, if the rule under consideration be correct, he contracts for the right to resort to this remedy, and use this remedy to collect his debt. He gives his credit upon this faith, and upon this alone. A change in the law which abolishes imprisonment for debt, and takes away this remedy, destroys the very remedy upon the faith of which the credit was given; it takes away all effective remedy, and renders the loss of the debt absolutely certain, which, without the change, he would have had no difficulty in collecting, the payment of which the debtor would not have attempted to evade, but for the change in the law of the remedy.

And, in this connection, let it be borne in mind that the English law as it existed, and was adopted in this country, was this remedy; and we may reasonably conclude that the framers of the Constitution, who were familiar with the rule, and who were daily in the habit of seeing it carried out in practice, had as much reference to this as to any other remedy when they adopted the clause of the Constitution prohibiting the States from passing laws impairing the obligation of con-

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tracts. Then, upon what reason can it be insisted that the intended to permit the States to alter, vary, or *abolish* the remedy, and to deny them the right to change or vary other remedies of much less value to the creditor?

If the Legislature can exempt the body entirely from seizure for the non-payment of a debt then in existence, why can it not exempt a horse, a cow, a tract of land, or any other piece of property? Can a solid legal reason be given to sustain the one, that will not apply with equal force to the other? If one impairs the obligation of the contract, the other does; both do, or neither does. If the Legislature may exempt the body, and leave the property subject, why may it not reverse the rule, and exempt the property and leave the body subject? Whatever may be said about the humanity of the age allowing the one and revolting at the other, the *legal* reason is the same in both cases, and the power of the State over the remedy is the same. I have seen no successful attempt by the advocates of the rule I am now combating to draw a solid distinction between the two cases, supported by logical or legal reasons. I expect to see none, for the simple reason that the legal distinction does not exist.

But what say the Courts on this question? The decisions are as unanimous as they are on the question of the statute of limitations. They hold that the law authorizing imprisonment for debt, is a law pertaining to the remedy, and that it is within the legitimate power of the State legislatures, to change this law of the remedy as to pre-existing, as well as to subsequent contracts, without impairing this obligation.

The case of *Mason vs. Haile*, decided by the Supreme Court of the United States, reported in 12 Wheat., 370, is a strong one. In that case Haile was in prison, having the benefit of prison bounds, under a final process against the body, and was discharged by a resolution of the Legislature of Rhode Island, without the payment of the debt; and the Supreme Court held, that this resolution did not impair the obligation of the contract. The Court says: "This is a measure which must be regulated by the views of policy and expediency entertained by the State legislatures. Such

laws act mainly upon the *remedy*, and that in part only. They do not take away the *entire remedy*, but only so far as *imprisonment forms a part of such remedy*."

Mr. Justice Story, in his commentaries on the Constitution, section 1381, says: "Rights may indeed exist, without any present, adequate, correspondent remedies, between private persons. Thus, a State may refuse to allow imprisonment for debt, and the debtor may have no property. But still the right of the creditor remains, and he may enforce it against the future property of the debtor." Again, in section 1385, he says: "And a State Legislature may discharge a party from imprisonment upon a judgment in a civil case of contract, without infringing the Constitution, for this is but a modification of the remedy, and does not impair the obligation of the contract."

The same doctrine is held in the case of *Sturges vs. Crowninshield*, 4 Wheat., 200, where Chief Justice Marshall says: "The distinction between the obligation of a contract, and the remedy given by the Legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." In that case, the insolvent law of New York, which discharged the defendant from imprisonment without the payment of the debt, was sustained by the Court.

Another illustration of the unsoundness of the position, that the remedial laws of the State, in existence at the time the contract is made, enter into or become part of it, and in support of the position that the laws governing the remedy may be changed or modified by the Legislature, without impairing the obligation of the contract, is found in the decisions of the Supreme Courts of the several States, sustaining the constitutionality of the *stay-laws*, forbidding the execution of process for the enforcement of contracts then in existence, for such periods, in the future, as the statutes of their respective States had prescribed.

It is worthy of remark that the more recent decisions of

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the courts of the Northern States, so far as they have come under my observation, sustain laws of this character, while the courts of several of the Southern States, where the condition of the country made the stay much more necessary to the welfare of the people than in the Northern States, where the losses by the war were less ruinous, have set aside stay-laws as unconstitutional. In Pennsylvania, the doctrine is well settled, that the Legislature may pass a stay-law, prohibiting the sale of property, or staying process for the enforcement of contracts in existence, for a definite and reasonable time; and it has been ruled, that a stay of three years is not an unreasonable period. This has been the rule of decisions in that great State for a quarter of a century past.

In *Chadwick vs. Moone*, 8 Watts & Sergt., 49, it was held, that local statutes which suspend, for a reasonable time, execution of a judgment on a previous contract, are not prohibited by the Constitution of the United States, and that the statute passed by the Legislature of that State in 1842, suspending, *for a year*, a sale under execution for less than two-thirds of the appraised value, is not unconstitutional. That able jurist, Chief Justice Gibson, delivering the opinion of the Court, said: "This case differs from the Illinois statute held by the Supreme Court of the United States to be unconstitutional, in 2 How., 608, in this cardinal feature, that its prohibition of execution was *perpetual*, while the duration of the stay, in Pennsylvania, was *limited*. In other words, the one might entirely destroy the remedy, while the other, as in the case at bar, only postponed the period of its performance."

The same doctrine has been affirmed in *Brietenback vs. Bush*, 8 Wright's Reps., 313; *Cox vs. Martin*, *Ibid*, 322; *Drexel et al. vs. Miller*, 13 Wright, 246; and *Clark vs. Martin*, 13 Wright, 299. The statute under which these decisions were made authorized a stay which might last for three years.

In *Baumbach vs. Bade*, 9 Wisconsin Reps., 559, the Supreme Court of that State fully sustains the constitutionality

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stay-law. The same doctrine is ably sustained by the same Court of Iowa, in McCormick vs. Busch, see Law for December, 1863. In this case the learned Chief Justice, delivering the opinion, says: "We have found no authority which holds that laws, giving the right to a *stay of execution* upon certain terms, would be invalid, as applied to contracts, unless it be certain cases in Kentucky, which are to be based upon certain peculiar provisions in the constitution."

It may be remarked, that the late rulings of the Courts of some of the Southern States had not then been made. These Southern decisions have not generally been unanimous, and I give all due deference to the opinion of the majority of the Court, I must say, that the dissenting opinions have been sustained by the weight of authority and the better reasoning. See the able dissenting opinions of Judge Walker, of this State, Judge Aldrich, of South Carolina, and others. It is not aside from the numerous decisions on this subject, and the contradictory positions which the advocates of the doctrine take, that the remedial laws of the State, in existence at the time the contract was entered into, and become part of, the contract, are driven home, and the doctrine has no foundation in principle, and is supported upon no sufficient reason.

There have been various definitions of the *obligation* of a contract. Mr. Justice Baldwin, in the case of McCracken vs. Hayward, says: "the obligation of a contract consists in its binding force on the party who makes it." Mr. Justice Grier, in Ogden vs. Sanders, says: "The obligation of a contract consists in the *power* and *efficacy* of the law, which applies to and enforces performance of the contract, and the payment of an equivalent for non-performance." Mr. Chief Justice, in the argument of the same case, defines it to be "a duty of performing a legal agreement." Whatever may be the correct definition, (and upon this point scarcely two Judges agree,) the position that the remedial laws of the State, in existence at the time, form part of it, is un-

The remedial laws of almost every State fix a time within which the contract must be performed.

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which debts may be collected by suit in the Courts. If these laws enter into the contract, its obligation is impaired by any change made in the law of the remedy. A enters into a contract with B, by which he binds himself to pay him one thousand dollars by the first day of January next.

The presumption of law is, that A will keep his promise, and if he does so, the remedial laws of the State have no connection whatever with the contract. But suppose the contract is broken by non-performance, the obligation still exists, and A is still under "the *duty* of performing his legal agreement," and B is entitled to his remedy to enforce performance. But what remedy? The particular one afforded by the law of the State at the time the contract was made, or the one afforded to suitors at the time the aid of the courts is sought? Unquestionably the latter. If the former were his right, he would be entitled to it, no matter where the action might be brought. If the contract were made in New York, and the suit was brought in Georgia, the plaintiff would, if that be the rule, be entitled to have the remedial laws of New York, which were in existence at the time the contract was made, enforced in the Courts of Georgia, which is contrary to the practice and decisions of all the Courts.

Or, suppose the suit is brought in the Courts of Georgia upon a contract made in Georgia five years since. Then, the law allowed the parties a trial, first by a *petit* jury, and either party dissatisfied was entitled to an appeal to a special jury, on payment of cost and giving security, as a matter of right, entered within four days from the adjournment of the Court. The new Constitution abolishes the appeal, and allows but one jury trial, but gives the Courts the power to grant new trials in proper cases. Are parties to contracts made prior to the new Constitution entitled to an appeal to a special jury in a suit brought since the change was made?

Again, the change made by the new Constitution greatly accelerates the collection of debts in this State. Under the old law, the defendant might file his pleas (generally not under oath) at the first term, and the case stood for trial by a jury at the second term. But at that time, either party

had the right to a continuance of the case upon a proper showing. After each party had a continuance, the case must be tried by the *petit* jury, and either party dissatisfied might enter an appeal to a special jury. The case then stood for trial again at the next term. But each party was entitled to two continuances on the appeal, on proper showing, as matter of right, and to as many more for providential cause as the court should think the principles of justice required. This might amount to a delay of several years before final judgment.

The new Constitution provides that the Court shall render judgment without the verdict of a jury, in all civil cases founded on contract when an issuable defence is not filed on oath. This not only cuts off the appeal from the *petit* to the special jury, with all its delay, but it abolishes jury trial, in all civil cases founded on contract unless the defendant files an issuable plea under oath. This change greatly abridges the right of defence allowed to a debtor by the old law, and accelerates the collection. But I apprehend it does not impair the obligation of contracts made prior to the adoption of the new Constitution. And yet, there is no escape from such a conclusion, if the law of the remedy in existence at the time the contract is made, enters into, and becomes part of it; and, in that case, any debtor would have a right to demand that his cause be tried under the old Constitution and laws, which are no longer in existence. This would be contrary to the practice of the Courts, and the almost unbroken current of decisions.

After a contract has been broken by the failure of the debtor to pay at the time agreed upon, the Constitution fixes no other time when payment shall be made, or when it may be coerced by law, but it leaves the creditor to collect when he can, under the remedial laws of the *forum* where he resides; which are no part of the contract, and are the subject of change by the Legislature, in accordance with its views of public policy. Take the case of a contract made by a citizen of Georgia with a citizen of New York, for an amount over \$100 00. The New York creditor may sue in either the

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Courts of this State, or of the United States. In the one Court, prior to the adoption of our new Constitution, he could, in no case, get judgment before the second term. In the other Court, if no issuable plea was filed, he could get judgment at the first term. Here are two laws, each affording a remedy in the same State, for the collection of the same debt. Now, if the law of the place in existence at the time the contract was made, enters into, and becomes a part of it, which of the two laws governing the remedy, is part of the contract in such a case? It cannot be both. The truth is, it is neither. But each government has the right to fix the times within which it will allow collections to be made in its own Courts, in accordance with its own views of sound policy or humanity, and to vary, alter, or modify them at pleasure.

Again, suppose the late Convention had made provision in the Constitution of Georgia, that the Superior Courts should sit but once a year, instead of once in six months, as heretofore, and that no sheriff should be ruled for money, except in term-time. This would have stopped the collection of judgments then in existence, for six months longer than the time allowed by law when they were rendered; and would have delayed the rendition of judgment, in case of contracts then in existence, for six months. But would this have impaired the obligation of the contract? or could creditors have compelled the Courts to sit every six months, in cases of contracts made prior to the change? Unquestionably not. Why not? For the simple reason that the law of the remedy then in existence, is no part of the contract, and the creditor has no right to claim that it be enforced according to that law.

Under our old Constitution the Supreme Court was obliged to deliver its decisions in every case that came before it, at the first term, except for providential cause, and the creditor, if the judgment were in his favor, had the right to the benefit of the decision at the first term. The new Constitution authorizes the Court, in its discretion, to withhold its decision till the second term. This may delay the creditor six months.

king collection, but it will not probably be contended the Supreme Court violates the obligation of contracts prior to the new Constitution, by holding up its decision the second term.

I might multiply illustrations and authorities to prove that the remedy, in existence at the time, is no part of the contract, but I deem it unnecessary. Those already produced, to my mind, sufficient to show that the *dicta* of Justice Baldwin, in the case referred to, are not law, and are reconcilable with the current of the decisions of the Supreme Court of the United States, and of the State Courts, in conflict with the opinions of the ablest jurists this country has produced.

Whether the evidence which is allowed to go to the jury under this statute, is such as the Courts may consider proper and proper, is not the question. It is not the province of the Courts to prescribe the rules of evidence by which they will be governed in the investigation of causes. That power belongs to the legislative department of the Government. The Legislature may establish new rules of evidence in derogation of the common law, but the judicial power is limited to the rule laid down. *Smith vs. The United States*, 5 Pet. 292. 35 *Ga. R.*, 26.

It is no good objection to the constitutionality of this statute that it authorizes the jury to adjust the equities between the parties, and to reduce the amount of the debt or debts for, according to the equities of each case. This is done every day in our Courts, in cases where the defendant sets up a total failure of consideration, fraud, mistake, and the like. Indeed, it is one of the objects of trial by jury to hear the facts pertinent to the issue, and find, not according to the letter of each written contract, but to see that the real equities between the parties are adjusted, and justice done according to those equities. And if, by reason of the rigidity of the common law, this cannot be done, the Court of Equity is ever ready to aid the Courts of law in the accomplishment of this great aim of all enlightened jurisprudence. The Constitution gives the General Assembly power to

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merge the common law and equity jurisdiction of the Courts, with a view to the just arrangement and settlement of all the equities between the parties in the *forum* where the litigation may be commenced. And the Legislature is not confined in its enactments to the old law of remedies, as it existed in any particular country or age. The science of jurisprudence, as well as all others, is progressive, and the rules governing the Courts in the administration of the law of rights and remedies, are varied and changed, as the civilization and enlightenment of the age, and the changing necessities of society may require. This is illustrated by the endless variety of rules and forms in the different States of the Union, all acting under the same Constitution of the United States, which, it is claimed, this change violates. The rules of evidence by which the Courts and juries are governed, in deciding upon the equities between the parties litigant, are ever changing in each of this large family of States. Probably no two are alike. The Constitution of the United States does not require that they shall be. In some of the States the parties in interest are excluded from giving evidence. In others, Georgia among the number, no one is incompetent as a witness in a civil case, on account of his interest, except in certain cases mentioned in the statute. The change was made in this State within the last few years. It was as much at variance with the old rules of evidence known to the Courts and the profession as is the Act now under consideration. But the Courts have upheld it, and the Supreme Court of the United States, in case of a sister State, has held that this State law, making this radical change in the rules of evidence, binds the Courts of the United States sitting as such States as have made the change. 1 Bl., 427; Ibid, 431. And just here, let me inquire how this decision can be sustained, if the remedial laws of the State, which necessarily include the law of evidence, enter into and become part of the contract, and can not be changed without impairing its obligation?

But I do not consider this an open question in this Court, since the numerous decisions made by it sustaining the Ordinance of the Convention of 1865, by which it is ordained:

That *all* contracts made between the 1st of June, 1861, and the 1st of June, 1865, whether expressed in writing or implied, or existing in parol, and not yet executed, shall receive *an equitable construction*, and either party, in any suit for the enforcement of any such contract may, upon the trial, give in evidence the *consideration* and the *value thereof at any time*, and the intention of the parties as to the particular currency in which payment was to be made, and the *value* of such currency *at any time*, and the verdict and judgment rendered shall be on principles of *equity*.

I am aware that those who attempt to draw a distinction on principle between that ordinance and this statute, allege that it was passed to adjust the equities and do justice between parties to contracts made during the war, most of which were made with reference to Confederate treasury notes, and were intended to be paid in that currency; and further, that the true object of that ordinance was only to permit an inquiry in Court as to the meaning of the word "dollar" when used in such contracts. But an examination of the language of the ordinance at once shows that it has no such limited import. It is not confined to contracts made with reference to Confederate treasury notes, or intended to be paid in such notes. It expressly embraces *all contracts* made within the period mentioned, and lets in the evidence, on the trial, of each and every one of them, no matter what may have been the intention of the parties, the currency in view, or the consideration; and it authorizes the jury to adjust the equities between the parties, and in so doing, if the proper adjustment requires it, to *reduce the amount of the debt sued for*.

The pretext that the only intention of the ordinance, was to permit evidence as to the meaning of the word dollar, when used in any contract, made during the period covered by it, is equally unfounded. The ordinance authorized either party to give in evidence the *consideration* and the *value thereof at any time*. Suppose the consideration of the note in suit, dated in 1861, to be a tract of land. What does the value of the land in 1865 or 1869, have to do with the meaning of the parties, at the time they made the con-

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tract, as to the sense in which they used the word dollar? What inference can be drawn by the jury on the trial, to aid them in the inquiry as to the sense in which the parties used the word "dollar" in 1861, by proof of the value of a tract of land, at the time of the trial in 1869, when the land may have increased or decreased ten fold in value? What more relevancy does such evidence have to the issue, than the evidence authorized by the statute now under consideration?

Again, the ordinance authorizes the parties to give in evidence the particular *currency* in which payment was to be made; and the *value* of such currency *at any time*. Suppose the contract was made on the 1st day of July, 1861, when the currency was worth ninety cents on the dollar, in gold. And suppose the note was made in reference to Confederate treasury notes, and was due 1st January, 1862, in that currency, which, at the date when due, was worth, in gold, eighty cents on the dollar. Now, I ask, how evidence, as to the value of Confederate treasury notes on the first day of May, 1865, when \$1,200 00 of those notes were worth but \$1 00 in gold, tends to illustrate the issue, as to the sense in which the parties used the word dollar? It cannot be denied that the evidence, in the case supposed, would be admissible, under the rulings of this Court, which have repeatedly sustained the constitutionality of the ordinance. But it would be admissible, not so much to show the sense in which the parties used the word "dollar," as to place all the facts and circumstances connected with the whole transaction before the jury, to enable them to "adjust the equities between the parties."

In *Hudspeth vs. Johnson*, 34 Ga. R., 405, that great and good man, Chief Justice Lumpkin, says: "We know full well, that the letter of that ordinance only applies to *contracts*, made between June, 1861, and June, 1865, but we doubt not it will receive, as it ought to do, a much broader signification."

In *McLaughlin & Co. vs. O'Dowd*, 34 Ga. R., 485, the same learned Judge says: "The jury had the right, not only to *reduce* the respective demands of the parties to a specie

s, but also to go into an examination of the consideration which the note was given, how much ought to be *deducted* from the *amount* of *said note*, by the unsoundness of the *value* for which the note was given, what is the usage of *money* in the community where the parties resided, as it affects settlements between merchants, etc., these, and all other matters which affected the equity of the parties, they had a right to inquire into, and to find their verdict accordingly."

He then refers to the statute in Crawford and Marbury's case, passed at the close of the Continental war, by which contracts were required to be reduced to the specie basis, and settled accordingly; and adds: "I will not undertake to say that this legislation was not just at the time; but that it would be a proper standard now, it requires no degree of experience in business to satisfy any one to the contrary. The Convention has acted more wisely under the circumstances, past and present, by which they were surrounded.

Walker, Judge, says, in *Cothran et al. vs. Scanlan*, 34 Ga. R., 557: "I am inclined to think that specie value of currency payable, is not the sole criterion prescribed by the ordinance of the Convention. The language would seem to allow and require a much *wider scope* for investigation."

In the case of *Slaughter et al. vs. Culpepper et al.*, 35 Ga. R., 27, Judge Harris delivering the opinion of the court, holds the ordinance constitutional. He says: "I do not think this clause of the ordinance obnoxious to the objection. It does no more, really, than change a rule regulating the admission of testimony in courts of law; it removes the obstacles created by technical rules, to a full inquiry into, and investigation of, executory contracts, made within the periods of time mentioned. It is apprehended, that to have done this, was within the competency of the legislative power at any time. Who is prepared to deny that the Legislature may not, at its discretion, alter and amend old rules of evidence and establish new? Who, that may not obliterate all distinctions which now characterize

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modes of procedure in courts of law and courts of equity and command, if they so enact, that the broad and liberal principles upon which justice is administered on the equity side of the Superior Courts, shall apply to and control verdicts of juries on its law side?"

The validity of the ordinance was again sustained *Evans vs. Walker*, 35 Ga. R., 118. After laying down the rule that the Judge who tries each case should give the whole ordinance in charge to the jury, Chief Justice Lumpkin says: "We certainly think that the Convention intended to give to the jury *more than the ordinary discretion* delegated to jurors; which should be respected by the Court unless flagrantly abused to the manifest wrong and injury of the parties."

This Court again affirmed the constitutionality of the ordinance in *Taylor vs. Flint*, 35 Ga. R., 124, and sustained and executed it in the following cases: *Elder vs. Ogletree*, 35 Ga. R., 64; *Cherry vs. Walker*, 36 Ga. R., 327; *Olive et al. vs. Coleman et al.*, 36 Ga. R., 553.

In this case, Judge Warner laid down the rule that the Court should allow the juries a *liberal discretion* under the ordinance.

No one can draw a solid distinction in principle between the Ordinance of 1865 and the Statute of 1868. If one is constitutional the other is also. Both change the old rule of evidence, and let in evidence heretofore considered by Courts irrelevant and improper. The object is the same in both cases, to reduce the debt "*sued for*," in accordance with the real equities existing between the parties, and to allow a recovery according to the face of the contract unless the equities of the case justify it. And I apprehend neither of the four learned Judges above named sustaining the constitutionality of the ordinance, felt at the moment that he was "*embalming* himself in his own infamy upon the records of this Court as a *debauched* judicial officer."

I am aware that an attempt was made in this Court, at the hearing, to draw a distinction, growing out of the po

ven by the statute to the jury, to *reduce* the debt. But a oment's examination will show that none in fact exists. he statute enacts that "in all such cases, the juries which y the same, shall have power to reduce the amount of the bt or debts *sued for*, according to the *equities* of each case, nd render such verdicts as to them shall appear just and quitable."

Now, what is the meaning of this? That the jury shall ear all the evidence necessary to place them in possession of l the facts and circumstances connected with the contracts, nd the relations and condition of the parties, and shall find heir verdict according to the *real equities* existing between hem; or, in other words, after examining the whole case, n the light of all the surrounding circumstances, they are to nder such verdict as to them shall seem just and equitable, bject, as in all other cases, to the revision and control of he Court, if it should think proper to set it aside and grant new trial, because the verdict is unjust or inequitable. his is the full measure of the power and discretion given to he jury by the statute. And this is what the juries have ong had the power to do, under such rules of evidence as xisted at the time, and have done, in a thousand cases where he defence of fraud, accident, mistake, undue influence, duress, total or partial failure of consideration, have been set up. In all such cases they find such verdict, under the evidence submitted to them, as seems to them just and equitable. The oath administered to every special jury in Georgia, from 1799 to 1863, required this. They were sworn well and truly to try each cause submitted to them, and a true verdict give, (not according to the rules of law in force when the contract was made, but,) "according to *equity* and the *opinion* you entertain of the *evidence* produced to you, to the best of your skill and knowledge, without favor or affection to either party." Marbury and Crawford's Digest, 307. Cobb's New Digest, 551. And this is just what the Ordinance of 1865 authorizes and requires, no more, no less. After prescribing the rules of evidence to govern in case of contracts made between June, 1861, and June, 1865, the ordinance declares

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that the verdict and judgment rendered shall be on principles of *equity*. And the caption, or title, declares it to be an ordinance "to authorize the courts of this State to *adjust the equities* between parties to contracts made, but not executed." What does this mean? Simply that the jury, after hearing all the evidence authorized by the ordinance, shall adjust the *equities* between the parties. In other words, they shall find "such verdict as to them shall appear *just and equitable*." And this rule applies with equal force to all verdicts, whether rendered under the ordinance or under this statute.

I need only add, in considering this branch of the case, that no honest man has any good reason to complain, when the verdict rendered in his case gives him all, to which in justice, equity and good conscience he is entitled.

6. But if the jury should seize upon the discretion given by the statute, as a pretext for the exercise of an unjust and arbitrary caprice, and should fail to administer substantial justice, and to dispense that equity between the parties which grows out of all the facts and surrounding circumstances of each case, it will be the duty of the Courts to exercise their undoubted power, and set aside such unjust verdicts, whether rendered in favor of plaintiffs or defendants.

7. In this case no complaint can be made at the finding of the jury, as there was no verdict. The defendants filed pleas which were intended to lay the foundation for the introduction of the evidence authorized by the statute, and the Court sustained plaintiff's demurrer to the pleas, and ordered them stricken from the record. A majority of this Court are of opinion that this ruling of the Court below was erroneous. We are unable to see how the obligation of the contract was in any degree impaired by the filing of these pleas.

8. When a statute authorizes certain facts to be given in evidence to the jury, which, under the old law, were excluded, and the defendant so shapes his pleas as to lay the proper foundation for the introduction of the evidence authorized by the statute, such pleas are not bad on demurrer, because not authorized by the old rules of pleading. If a statute gives

ew defence, or authorizes the introduction of evidence not
viously admissible, the defendant may so shape his pleas
to avail himself of the benefits of the new law, and the
rules of pleading must yield to the statute.

Without making any *pharisaical* pretensions to greater
purity than others possess, the majority of the Court, con-
scious of the rectitude of their own motives, feel it due to
themselves, in closing this opinion, to remark, that they will
not descend from their proper position on the bench, to engage
in controversy with the dissenting Judge; nor will they
enquire into the *incentives* which have prompted the unjust
and insidious assault made upon them. Extraordinary and
unprecedented as the attack has been, the proprieties of the
occasion, and the dignity of the Court, alike forbid a reply.
After a careful examination of the authorities, we are sat-
isfied that the judgment of the Court below is erroneous, and
ought to be reversed. And it is so ordered.

MCCAY, J., concurring, announced his views by the head-
notes, which appear under his name, but he wrote no opinion
in the cause.

WARNER, J., dissenting.

This was an action brought by the plaintiff against the
defendants, on a promissory note, for the sum of \$5,200 00,
dated 22d January, 1861, and due forty-five days after date.
The defendant, Stewart, filed a plea to the plaintiff's action
against him, in which he alleged certain facts by way of
 defence thereto, as provided by the provisions of the first sec-
 tion of the Act of 1868, for "the relief of debtors, and to
 authorize the adjustment of debts upon the principles of
 equity." The plaintiff demurred to the defendant's plea,
 and the Court below sustained the demurrer. The defend-
 ant excepted, and now assigns for error here, that the Court
 erred in sustaining the plaintiff's demurrer to his plea. The
 merits of the plea will be better understood, by reciting
 the first section of the Act which authorizes the facts con-
 tained in the plea, to be set up as a *legal defence* to the plain-

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tiff's action upon the note. The first section of the Act of 1868, declares, "That, in all suits, which shall be brought for the *recovery of debts* in any of the courts of this State, or upon *contracts* for the payment of money, made *prior* to the 1st of June, 1865, (except for the sale or hire of slaves), it shall be *lawful* for the parties in all such cases, to give in evidence before the jury impaneled to try the same, the consideration of the debt, or contract, which may be the subject of the suit, the amount and value of the property owned by the defendant at the time the debt was contracted, or the contract entered into, to shew upon the faith of *what property* credit was given to him, and what tender, or tenders of payment he made to the creditor, at any time, and that the non-payment of the debt, or debts, was owing to the refusal of the creditor to receive the money tendered, or *offered to be tendered*, the destruction or loss of the property upon the faith of which the credit was given, and *how*, and in *what manner*, the property was lost or destroyed, and by *whose default*; and in all such cases, *the juries which try the same, shall have power to reduce the amount of the debt or debts sued for, according to the equities of each case, and render such verdicts as to them shall appear just and equitable.*" The plea, and the demurrer thereto, necessarily raises the question, whether the *facts* authorized by this Act of the Legislature, can be plead as a *legal defence*, and proved, so as to authorize the jury to *reduce* the amount of the plaintiff's debt, as to *them* shall appear just and equitable. If the Legislature have the *constitutional power* to enact a law to that effect, then, it can be done, but if the Legislature have not the constitutional power and authority to do so, then it cannot be done, and that is the *precise question* presented for the decision of the Court by the plea and demurrer. The plea sets forth the *facts* which the Act authorizes the defendant to plead, and prove, as a *legal defence*, in order to *reduce the plaintiff's debt*. The plaintiff demurs thereto, and says, admitting all the facts stated in your plea to be true and authorized by the Act, still, under the supreme law of the land, the Legislature had no power to pass such an Act,

cause it *impairs* the obligation of the plaintiff's contract, and he demands the judgment of the Court upon *that issue of law* which is made by his demurrer. The constitutionality of the Act is, therefore, *necessarily* presented by the plea and demurrer for the judgment of the Court. There is no *avoiding* it. The question is *squarely* presented by the plea and demurrer. Is the Act constitutional or not? If it is, *even* the plea is good. If the Act is not constitutional, then the plea is bad, and constitutes no *legal defence* to the plaintiff's action; that is all there is in it, and this Court ought not to *shirk* its responsibility by referring it to a jury, to see whether they would make any *improper use* of the evidence authorized by the Act. I shall not undertake here to repeat what was said in the case of *Aycock et al., vs. Martin et al.*, 17 Ga. R., 127, in regard to what constitutes the obligation of a contract, but will state the rule upon that question, as declared by the Supreme Court of the United States, in two of the *latest* decisions made by that Court, upon a careful review of *all the prior adjudications* made by that tribunal. The Supreme Court of the United States is the recognized interpreter and expounder of the Federal Constitution, and its decision upon the question now under consideration, is *binding authority* upon this Court. In the case of *McCracken vs. Hayward*, 2 Howard's Reps, 612, the Court says: "The obligation of a contract consists in its *binding force* on the party who makes it. This depends on *the laws in existence when it is made*; these are necessarily referred to in all contracts, and forming a part of them, as the *measure of the obligation* to perform them by the one party, and the right required by the other. There can be no *other standard* by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled *legal meaning*. When it becomes consummated, the *law* defines the *duty*, and the *right*, *compels* one party to perform the thing contracted for, and gives the other a right to *enforce* the performance by *the remedies then in force*. If any subsequent law affect to *diminish* the duty, or to *impair the right*, it necessarily bears on the obligation of the contract in favor

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of one party to the injury of the other; hence *any law*, which in its operation amounts to a denial, or *obstruction* of the rights accruing by a contract, though *professing* to act only on *the remedy*, is directly obnoxious to the prohibition of the Constitution." Again the Court says: "The *obligation* of the contract between the parties in this case, was to *perform* the promises and undertakings contained therein; the right of *the plaintiff* was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the *existing laws of Illinois*. These *laws*, giving these rights, were as perfectly *binding on the defendant*, and as much a *part of the contract*, as if they had been set forth in its stipulations in the *very words of the law* relating to judgments and executions." In the case of *Van Hoffman vs. The City of Quincy*, (4 Wallace Rep., 550), decided in 1866, the Court, after receiving and commenting upon the previous adjudications made upon this question in the Supreme Court of the United States, says: "It is also settled, that *the laws which subsist at the time and place of the making of a contract*, and where it is to be performed, enter into, and form a *part of it*, as if they were expressly referred to, or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and *enforcement*." On page 554 the Court, speaking of the distinction between the obligation of the contract and the remedy, says: "The doctrine upon that subject, by the *latest* adjudications of this Court, render the distinction one rather of *form* than *substance*. A right without a *remedy* is as if it were *not*. For every beneficial purpose, it may be said *not to exist*. A different result would leave nothing of the contract but an *abstract right* of no *practical value*, and render the protection of the Constitution a *shadow* and a *delusion*. Nothing can be more material to the obligation of a contract than *the means of enforcement*. Without the *remedy*, the contract may, indeed, in the sense of *the law*, be said *not to exist*, and its obligation to fall within the class of those social duties which depend, for their

fulfilment, wholly upon the will of the individual. The means of validity and remedy are *inseparable*, and *both* are parts of *the obligation* which is guaranteed by the Constitution against *invasion*."

Again, the Court, say in that case, "one of the *tests* that a contract has been *impaired* is, that its *value* has, by legislation, been *diminished*. It is not, by the Constitution, to be *impaired at all*. This is not a question of degree, or cause, but of *encroaching*, in *any respect*, on *its obligation*, dispensing with *any part of its force*." In *Green vs. Biddle*, (8 Wheaton's R., 1), the Supreme Court of the United States, thus state the rule in regard to laws *impairing* the obligation of contracts: "The objection to a law on the ground of its *impairing* the obligation of a contract, can never depend upon the *extent* of the change which the law effects in it. Any deviation from its terms, by *postponing*, or *accelerating* the period of performance which it prescribes, imposing *conditions* not expressed in the contract, or *dispensing* with the performance of those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, *impairs* its obligation." The soundness of this principle of the law, as applicable to contracts, has been twice distinctly recognized by this Court. See *The Justices of the Inferior Court of Morgan county vs. Sparks et al.*, 6 Ga. R., 139; *Winter vs. Jones*, 10 Ga. R., 195. The modern doctrine asserted by the majority of this Court, "that the Legislature has the right to change, modify, or vary the nature and extent of *the remedy*, provided a *substantive remedy* is left to the creditor," finds no countenance or support, in the decisions of the Supreme Court of the United States, whenever such change, modification, or variance *impairs* the obligation of the contract, or hinders, or obstructs its *enforcement*. The Constitution of the United States declares, that "No State shall pass *any law impairing the obligation of contracts*." We have shewn, by the decisions of the Supreme Court of the United States, (which are binding authority upon this Court, in regard to the question involved), what is the well established rule in regard to *impairing* the obli-

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tion of contracts, as well as what constitutes *the obligation* of a contract. Now, let us examine and see whether the Act of 1868, according to the *latest* adjudications of that Court, *im-*
pairs the obligation of the plaintiff's contract in this case. When the contract was made, in 1661, the law, as it *then* existed, did not allow the defendant to prove, upon the trial of a suit for the enforcement of his contract, by way of *defence*, that he had tendered, or offered to tender, him Confederate money, in payment of his debt, did not allow him to prove, upon the trial, the destruction or loss of his property by emancipation, or other cause, or to prove, upon the faith of what property the credit was given to him, or to prove the amount and value of the property owned by him at the time the debt was contracted, or that he had lost his property by the *default* of any person, and especially did *not* the *existing law* at the time the contract was made, allow the defendant, upon proof of these facts, or any of them, to have the plaintiff's debt *reduced* in amount, to such a sum as the jury, who might try the case, should think to be just and equitable; but, by the Act of 1868, the defendant *can* prove any or all of these facts, as a *legal defence*, and thereupon, the Act declares that the jury which try the case, shall have *power to reduce the amount of his debt*, according to the equity of his case, as made by the aforesaid evidence, and render such verdict as *to them*, shall appear just and equitable, under the aforesaid evidence. In other words, the Act makes certain facts a *legal defence* to the plaintiff's suit, which were *not a legal defence* when the contract was made, authorizes the defendant to prove them on the trial, and thereby, *reduce* the amount of his debt, as the jury, upon consideration of *such facts*, shall deem to be equitable and just. In short, by this manipulating process, to make a new and different contract for him, from the one made by the contracting parties, under the existing law, at the time the contract was made, creating a new and different obligation on the part of the defendant to perform it, to the *prejudice* of the plaintiff's rights, as the same existed under the law, at the time of making the contract. One thing is very cer-

ain, that the rights of the parties, under the contract and the obligation to perform it, are not the same *now*, under the provisions of the Act of 1868, as they were under the law which existed, applicable to the contract *at the time it was made*.

In the case of Van Hoffman vs. The City of Quincy, before cited, the Supreme Court says, that "one of the *tests* that a contract has been impaired, is, that its value has, by legislation, been *diminished*." Apply that test to the plaintiff's contract in this case. Would any rational man give as much for this contract, and the defendant's obligation to perform, *now*, since the passage of the Act of 1868, authorizing the defendant to prove in his defence the facts specified therein, with *power* given to the jury to *reduce* the amount of the debt, on proof of such facts, as he would have given for it under the law as it existed at the time the contract was made? If not, why not? The answer is obvious to any rational mind. It is because the Act of 1868 renders that contract, and the obligation to perform it, *less valuable* on account of the *defences* allowed by that Act, and *the power* given to the jury by it to *reduce the debt* as to *them* may seem just and equitable. The law that existed and controlled the rights of the parties at the time the contract was made, has been changed, whereby the plaintiff's rights have been *injured*, and the defendant's obligations to perform that contract imposed on him by the existing law at the time the contract was made, has been *impaired* by that Act to the plaintiff's *regret*.

But it is said this Act only changes the *remedy*, only changes the *rules of evidence*, and that it is competent for the legislature to do that without impairing the obligation of the contract. It is true, the Legislature have the constitutional power to alter and change the remedy, to alter and change the rules of evidence: *provided always*, that in doing so the obligation of the contract is not *impaired*, within the intent and meaning of the Constitution. It is *not true*, however, that the Legislature have the power, either under pretext to alter and change *the remedy*, or under the pre-

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text to alter and change *the rules of evidence*, to impair the obligation of contracts. It makes no difference under what *name* or *pretext* the injury is done, the question to be answered in this case is, whether the Act of 1868 *impairs* the obligation of the plaintiff's contract as the same existed under the law *at the time the contract was made*? According to the principles recognized and adjudicated by the Supreme Court of the United States in the cases before cited, this Act of the Legislature most clearly and unquestionably *impairs* the obligation of the plaintiff's contract, and is, therefore, unconstitutional and void.

It has been said in this case, however, that if the jury should *reduce* the plaintiff's debt, other than *the equities* between the parties permit, it will be the duty of the Court to set the verdict aside. What equities? Such equities, I suppose, as spring out of the *facts* authorized to be proved by the defendant in his *defence to the note*, under the Act of 1868, which did not constitute any *legal* defence thereto at the time the contract was made. But if the Act is *constitutional*, then the evidence authorized to be submitted to the jury under it is *legal* evidence, and the jury have the right to consider it, and act upon it, and are expressly clothed with *power*, by the Act, to *reduce* the amount of the plaintiff's debt as to *them* shall appear just and equitable. If the jury shall do what the Act *expressly empowers them to do*, it is extremely difficult to perceive what legal right the Court would have to set aside their verdict. Under the Act, the jury have the *power*, under the evidence authorized by it, to render such verdict as to *them* shall appear just and equitable. If the Act is constitutional, and the evidence before the jury is *legal* evidence, and the jury return a verdict upon it *reducing* the amount of the plaintiff's debt, what *legal* right or power has the Court, under this Act, to set their verdict aside? The verdict would not be contrary to *law*, if the Act is constitutional, nor contrary to the *evidence*; the *power* to reduce the debt is expressly conferred upon the jury by the Act, and therefore the Court would have *legal* right to interfere with their verdict. But take the other view of the question, and hold

that the Courts have the *legal right* to set aside the verdict, if the jury shall impair the obligation of the plaintiff's contract by *reducing his debt*, then it is quite apparent that the Act of 1868, for the relief of debtors, *practically* amounts to nothing, it is mere *brutum fulmen*. The plain truth, however, is, that the Legislature intended to provide for the relief of debtors in the manner indicated by the Act, and did not intend that the Courts should set aside the verdicts of the juries, if they *reduced* the plaintiff's debt, and thereby render the Act a *practical nullity*.

It was contended, on the argument, that the Act of 1868 stood upon the same footing as the ordinance of the Convention of 1865, and that this Court had held that ordinance to be constitutional. That ordinance simply provided, that in any suit for the *enforcement of any contract* specified therein, the parties might show the particular *currency* in which payment was to be made, and the *value* of such currency, etc. The object of that ordinance was, not to *impair* the obligation of contracts, but to *enforce* them according to the actual value thereof in *good money*. If the contract was payable in Confederate dollars, it allowed evidence to be given as to the *value* of Confederate dollars in *good money*, and what was the value of the consideration of the contract in *good money*, so as to maintain and *enforce* the obligation of the contract upon the principles of equity, as *regulated by law*. See *Oliver & Wooten vs. Coleman et al.*, 36th Ga. Rep., 555. The rights of the people in this State to their property and effects are regulated and protected by *law*, and are not *dependent* upon the abstract notions of *equity* which a Court or jury may entertain of them. It is *the law of the land* which regulates and controls the rights to property in this State. There is *no equity* which is above or independent of the *law*. The Code declares that "equity is *ancillary*, not *antagonistic*, to the law: hence, equity *follows the law*, where the rule of law is applicable, and the *analogy of the law*, where no rule is directly applicable." Code, section 3028. We are aware that *sporadic* decisions, made by the State Courts, may be cited in favor of impairing the obligation of contracts,

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though *professing* not to do so, under the *pretext* of regulating the *remedy* and the *admissibility of evidence*, but ~~the~~ decisions have generally been made under the pressure of public opinion, in times of pecuniary embarrassment, when the relief *spasm* was upon the people; sometimes made by Judges who were *expressly appointed* for the purpose of making such decisions during *that period of time*; but such decisions, so made, are entitled to very little consideration in the face of the plain provisions of the Constitution, and the plain interpretation thereof by the repeated decisions of the Supreme Court of the United States, which have already been cited, and which are *binding authority* upon this question. The great weight of judicial authority in the several States is, however, in favor of maintaining the integrity of the Constitution, and protecting the *inviolability* of the obligation of contracts. That there should have been any conflict of decisions in the State Courts upon this question, only proves, that when there is a *will* to impair the obligation of contracts, subtle, crafty, unscrupulous men can always find a *way* to do it. Robbery, under the form and color of *law*, is the *meanest* sort of robbery. The highwayman who presents his pistol to the head of the traveler, and commands him to stand and deliver, incurs some *personal risk*, but those who rob under the form and color of *law*, accomplish the same object as the highwayman, without the least *personal danger* to themselves. The common and usual *pretext* for violating the Constitution, is under the *form of remedial legislation*, or by altering the *rules of evidence*. These *pretexts* and *excuses*, though often specious and plausible, will not bear the test of *legal criticism*. But the Supreme Court say, in the case of Van Hoffman vs. The City of Quincy, before cited, that the distinction between the *contract* and the *remedy*, by the *latest* adjudications of that Court, is one rather of "*form than substance*." This is sound doctrine. What is a man's *right* to his contract worth, at the time of making it, without the *remedy* afforded by the *then existing law* to enforce it? If the Act of 1868 is *constitutional*, it illustrates very clearly what the plaintiff's right to *his contract* in this case is worth *now*.

The Constitution of the United States is the fundamental and *paramount law* for the government of the Courts and people of this State. It has been justly remarked, by an eminent civilian, that—"to attack the Constitution of the State, and to violate its laws, is a *capital crime against society*, and if those guilty of it are *invested with authority*, they add to this crime a *perfidious abuse of the power with which they are intrusted*. Vattel, 9, section 30. In view of the obligation imposed upon me to support and maintain the integrity of the Constitution of the United States, which declares that no State shall pass *any law* impairing the obligation of contracts," and not entertaining the least doubt that the Act of 1868, both upon principle and the authority of the decisions of the Supreme Court of the United States, is a *palpable violation* of that Constitution, I am unwilling to *embalm myself* in my own *infamy*, upon the records of this Court, as a *debauched* judicial officer, in holding that Act to be *constitutional*; therefore, I dissent from the judgment of the Court in this case.

THE FIRST NATIONAL BANK OF MACON, plaintiff in error,
vs. CHARLES NELSON & Co., defendants in error.

An agent for the sale of goods cannot, as against the owner, pledge or mortgage them to a third party, to secure advances made on his own account.

To constitute a pledge or pawn, under the Code, there must be a *deposit* of the thing pawned, and this cannot be dispensed with by a written agreement, that the party making the pledge will be the bailee of the pawn.

When, in the submission of the law and the facts of a case to the Judge, it was agreed that if the Judge should have any doubts upon a question of fact, he should submit it to a special jury, and on the trial there arose a question of notice to a bank, and it was proven that the fact was advertised in two daily papers taken at the bank, was shown to one of its directors, published in a large printed card and circulated among the business men of the community, and painted in large letters on the walls of the store in which the goods, about which the dispute arose, were kept:

The First National Bank of Macon vs. Nelson & Co.

Held, That although the cashier and president of the bank, and one of the clerks, denied the notice, as witnesses, the Judge might well fail to have such doubts as would require him to call in the jury.

Equity. Pledges. Notice. Tried by Judge COLE. Bibb Superior Court. May Term, 1868.

Megrath & Patterson were grocers and commission-merchants, on Poplar street, Macon, Georgia. On the 10th of December, 1867, they mortgaged to one Holmes, all their stock of goods, wares and merchandize, and their choses in action, to secure about \$10,000 00, due by them to said Holmes. This mortgage was not recorded till the 4th of January, 1868. It was foreclosed, and a levy of the mortgage was made upon the stock in store, including certain whiskey and bacon, on which The First National Bank of Macon had a claim. Its claim was as follows: On the 2d of December, 1867, it advanced to Megrath & Patterson, \$1,000 00, on twenty-five barrels of whiskey, and took from them a paper, as follows:

“\$1,000 00.

MACON, GA., December 2, 1867.

Received from The First National Bank of Macon, one thousand dollars, as advance by it, on twenty-five barrels whiskey, marked “E,” now stored in our store, on Poplar street, which whiskey we hereby place in its control and possession, to be used by said bank as its own property, for its reimbursement of said amount, with interest, insurance, and all other expenses thereon, should we fail to pay the same when due, to-wit: on the 1-4 day of January, 1868, but if paid when due, or before said whiskey is disposed of by said bank, for its reimbursement as aforesaid, then the said whiskey to be returned to us.

MEGRATH & PATTERSON.”

The bank made other advances to them, on whiskey, as follows: In December, 1867, on the 14th, \$1,300 00, on fifteen barrels; on the 23d, \$3,000 00, on twelve barrels (and twelve casks of bacon); on the 24th, \$1,000 00, on ten barrels, and on the 28th, \$2,120 00, on thirty-five barrels. These advances were each evidenced by a receipt, a *fac simile* of the one above quoted, *mutatis mutandis*. When they were made, the bank officers were ignorant of the existence of said mortgage. Megrath & Patterson were instructed, by the

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's agent, to set said whiskey and bacon apart, as the property of the bank, and it is believed that this was done. Megrath & Patterson sold thirty-one barrels of said whiskey, and all of said bacon, to-wit: \$4,500 00 worth, and no part of the proceeds to the bank. Megrath & Patterson were failing, their store was in the sheriff's hands, there was reason to apprehend that they would depart the realm without reimbursing the bank.

Under this state of facts, set forth in its bill, the bank asked that Holmes's *fi. fa.* should be enjoined from selling whiskey, that the unsold whiskey, as also the proceeds of what sold, if it could be traced, should be given to the bank, and that Megrath & Patterson should give bond and security for the eventual condemnation money, in the cause.

The Judge granted the injunction, and required the security. Holmes made no fight with the bank. But Charles Nelson & Co., of Nashville, Tennessee, came into Court, filed their petition to be made parties to the litigation, on the following reasons stated by them: They were largely engaged in manufacturing whiskey, and had made Megrath & Patterson their special agents for the sale of it. This agency had lasted for eighteen months, and Megrath & Patterson had sold a great deal of whiskey for them. Their authority, as agents, was special and limited, they were to sell for cash only, and had no authority to pledge, pawn, or mortgage it, or in any way to use it in their business. Their only duty was to sell for cash, deduct five *per cent.* for commission, and remit the balance to them. Since the first of November, 1867, they had sent Megrath & Patterson one hundred thirty-two barrels of whiskey, and they had accounted for none of it; the ninety-seven barrels claimed by the bank, of these one hundred and thirty-two. Megrath & Patterson had published their agency in the gazettes of Macon, and had emblazoned it in large and conspicuous signs upon their store-house, and Charles Nelson & Co. were persuaded that the bank's officers were cognizant of the agency before advances were made. If they did not know it, their negligence proceeded from carelessness. From the anomalous

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style of receipt taken, from the facts that Megrath & Patterson never had ninety-seven barrels of whiskey in store any time in December, 1867, and that, of the barrels in controversy, forty-three did not reach Megrath & Patterson the 26th of said December, and because the prices fixed not over two-thirds of the value of the whiskey, etc. charged that the bank never relied upon the whiskey pawn or pledge. The bank never undertook to control of it till said levy was made, but, on the contrary, the whiskey remained in the exclusive possession of Megrath & Patterson, and with the knowledge of said officers, they sold said whiskey, just as if said advances had not been made. The sixty-seven barrels of whiskey in the sheriff's hands are worth \$4,800 00, which amount Megrath & Patterson owe them. For these reasons, they prayed that they might have this whiskey, or its proceeds. Charles Nelson & Co. became parties, and the whiskey was put into the possession of a Receiver. They and the bank then agreed that the Judge should try the cause, without a jury; that his decision of facts and law should be subject to exception by either party, and that if he had doubt as to any fact, matter, or the decision, he (or the Supreme Court, if it went to the Supreme Court) should direct an issue made up, and submitted to a jury. Holmes and Megrath & Patterson consented to the issue, Holmes disclaiming any right to the whiskey. The decision was to be final, unless excepted to as aforesaid.

On the trial, the bank introduced, as evidence, their receipts from Megrath & Patterson, and each party examined several witnesses.

It was shown that this whiskey was part of that sold by Megrath & Patterson to Chas. Nelson & Co., and that the bank had charged one and a half *per cent.* per month on the advances, one *per cent.* being, as the witness said, for the advance, and the half *per cent.* for interest. Charles Nelson & Co. contended that even if the whiskey had been pawned to the bank, Megrath & Patterson had no right to pledge it, and if they undertook to pledge it, the contract was void because the bank took usury for its money.

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the whiskey pledged was never separated from the balance stock, but was treated in every way as if it had not pledged. The bank officers, however, testified that they ordered Megrath & Patterson to set it apart, and hold it as bank's property, and subject to its order. Plant, the president of the bank, was in Megrath & Patterson's store when the officer came to make the levy; Patterson, pointing out of sixty-six barrels of whiskey, said to Plant, "that is whiskey," and to the officer, "you can not levy on that belongs to the bank;" Patterson said something about assignment, and when Plant asked what he meant by assignment, he replied, "from a man in Nashville, I can get it with him." The main controversy was as to whether the bank had notice that Megrath & Patterson were the agents of Charles Nelson & Co., for the sale of their whiskey. On this point Plant testified, that he had been in Megrath & Patterson's store several times, but had never noticed any of their being agents, and that he took the city papers, and did not notice their advertisement therein, and denied knowledge of their said agency. The cashier of the bank testified, that he had noticed on their sign at the store, "Nelson & Co.'s copper-distilled whiskey," but not that they were agents for its sale, and that he had seen their advertisement, and did not take notice of it, nor have any knowledge of their agency. The collecting clerk of the bank also testified to his ignorance of such agency. Chas. Nelson & Co. produced the following evidence to charge the bank with such notice.

Patterson said he thought the bank officers knew it, because Megrath & Patterson advertised it in the city papers, and in bills and circulars, and in large letters in their sign, on the outside of the store, put up about the first of November, because their agency was generally known throughout the city, and because Mr. Ross was one of the bank's directors, and a member of the firm of J. B. Ross & Son, which was known of said agency. (It was shewn that Ross, the director, was absent from Macon when these advances were made, and knew nothing of them, and that the business of

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the bank was conducted by the president, etc., and the directors gave no attention to such matters as this.)

Several merchants of Macon testified, that they knew of such agency, (one said he had known it for two years,) that the sign and their advertisements so denominated them, and that it was generally known among wholesale whiskey dealers in Macon.

A letter, written by Megrath & Patterson, was on commercial note paper, three sides of which contained a printed advertisement of their business. On the first page, in a conspicuous place, was "*Agents for CHAS. NELSON & Co. Copper-distilled Whiskies.*" Its date was the 19th of February, 1867. The words on the sign were not shewn. In a long and conspicuous advertisement in the daily city paper they said: "*We are sole agents for CHAS. NELSON'S celebrated Copper-distilled WHISKIES.*"

The Judge held that no title to said whiskey passed from Megrath & Patterson to the bank under the contracts and facts aforesaid; that the bank could not hold the whiskey as a pawn against Chas. Nelson & Co., because there was no delivery to the bank, and because the bank had constructive notice of the said agency. But before any order was taken, the bank's solicitors called his attention to the clause in the agreement as to doubts, and asked him to submit the question of notice to a special jury. The Judge declined doing so, saying that he would have so to charge a jury as that the finding must be the same as his own.

Thereupon the solicitors of the bank excepted, and assigned as error his decision, and the reasons given for it, and his refusal to submit the question of notice to a jury.

LANIER & ANDERSON, for plaintiff in error, said, a principal is bound, if his commission merchant pledge his goods to one ignorant of the agency. It was not so in England till 1823. But it is so here. 23 Ga. R., 90. Irwin's Code, secs. 1944, 2111, 2179. 2 Story on Con., sec. 711. 2 Story on Agency, note to sec. 113. 11th Howard's R., 221. *Eastman vs. McAlpin*, 1 Kelly, (Ga. R.) 157. Duane &

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Statutes, 579. 3 *Kelly*, (*Ga. R.*,) 146. 7 *M. & W.*, 196. 4 *Bingh.*, 394. As to delivery, they cited 2 *Kent*, (note,) 578. 14 *Pick. R.* 34 *Ga. R.*, 222. 2 *Story on Con.*, 719. 37 *N. H. Rep.*, 428. 7 *Ohio R.*, 194. 11 *Met-*
cal, 493. As to notice, they cited *Jones vs. Smith*, 23 *Eng.*
Chan. Rep., (1 *Hare*,) 55. *Greenleaf on Ev.*, sec. 216.
Flaming vs. Townsend, 6 *Ga. R.*, 111. *Jordan vs. Pollock*,
 14 *Ga. R.*, 158. *Aug. & Ames on Corp.*, 247 and 248,
 Chap. 9. As to the character of *Megrath & Patterson's* agen-
 cy, they cited *Story on Agency*, secs. 17, 18, 19. *Irwin's*
Code, sec. 2170. As to the usury, they said the Judge
 below did not pass on it, and, therefore, this Court ought not,
 but said, also, that sec. 1478 of our Code applied only to
 banks of this *State*, and no such penalty attached to National
 Banks. See Acts of Congress, June 3d, 1864, sec. 30.

JAMES JACKSON and HARRIS & HUNTER, for defendant
 in error, submitted the following points:

Megrath & Patterson, as factors, had no right to pawn or
 pledge these goods; 1 *Parson*, 50, note G; *Story on Agency*,
 24, 147; 2 *Strange*, 1178; 3 *Atkins*, 52; 6 *East*, 537; 7
East, 4; 15 *East*, 41; 4 *Burrows*, 2046; 11 *Howard*, 224;
 1 *Mass.*, 398; 13 *Mass.*, 181; 23 *Ga.*, 205. The instru-
 ments sued on by the bank are not mortgages. *Code*, 1944,
 1945. They cannot be construed to be sales, because no
 price was agreed upon, and were not valid, even as pawns,
 because of no actual delivery, but if anything, in the way of
 valid security for money borrowed, this is their character,
 and, as such, no title passed to the bank against the true
 owner. *Code*, 2110, 2111, 2112, 2113, 2114, 2597; 1 *Amer.*
Lead. Cases, 668, 662; 11 *Howard*, 226. It makes no dif-
 ference whether the bank had or had not notice of the con-
 signment. 1 *Maule & Selwin*, 140, 493; 5 *Vesey*, 213;
Code, 2111. Nor does section 2179 of our Code, alter the
 common law in this respect. Repeal by implication. *Sedg-*
wick on Statute and Com. Law, 127; 5 *Hill*, 221; 2 *Barb.*,
 316; 6 *Cushing*, 465. If 2179 be construed to apply to
 factors pledging goods on consignment, not only is it forcing

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the statute beyond necessary implication, in repealing the common law principle, but it makes it conflict directly with section 2111 of the Code, and makes 2111 conflict with 2597. If construed to apply to purchasers, and not to pawnees in the case of factors, the entire Code harmonizes and all its provisions must be construed in "*pari materia*," and be reconciled if possible. 15 *Ga.*, 361. Sedgwick, *on Stat. and Com. Law*, 127. Notice to the cashier is notice to the bank. 17 *Ga.*, 99. The President could have seen the placard. The facts constituted, in law, notice. 14 *Ga.*, 158. Constructive notice is enough for this case; for 2179, of the Code, does not read "having *actual* notice," but "having notice"; any sort of notice. 23 *Ga.*, 203; 25 *Ga.*, 277; 26 *Ga.*, 138; U. S. Stat., 1863, 1865, 102d page *et seq.* These contracts of the bank are wholly void, because of the usury Act of June, 1864, secs. 30 and 53. It cannot at law or in equity, collect these contracts. U. S. Stat. at Large, 1863, 1865, pages 108, 116; 2 Peters, 527; 3 Head, 724; 14 New Hamp., 294; 8 Ohio, 252; Code of Ga., 1478 (1, 2), 1840.

MCCAY, J.

1. The general rule of the common law is, that every man dealing with another in reference to property that other may have in his possession, must "take care," *caveat emptor*. The property may be stolen, or borrowed, or pledged, or in the possession of a bailee for some specific purpose, and if so, the party in possession can convey no better or further right than he has himself. Broome's Legal Maxims, (355, 267); Irwin's Code, sec. 2597. There are some exceptions to this rule, as where the property is money, or promissory notes not due, and also cases where the conduct of the true owner is such that he is estopped from setting up his title against an innocent purchaser. 3 B. & C., 42; 3 Bing. 145. Clearly, however, the mere permission, by the true owner, to a third party, to have possession, is not such an act as estops him. 3 B. & C., 42. Such a rule would place it in the power of

bailee to dispose of the thing with which he is intrusted, could seriously interfere with the ordinary affairs of

is the case of a factor, who has goods put in his possession for sale, an exception. The goods are not his. He uses them for a specific purpose, and, outside of that purpose, he has no more authority in reference to them, than a mere bailee has, outside of the purpose for which *he* has the goods. The goods belong to the true owner. If they are taken from him, if he lend them, if he deposit them, they are not his, except so far as he clothes another with power over them.

A factor, for the sale of goods, has only power to sell them. For purposes of sale, he is a general agent, and one may deal with him in all matters pertaining to that purpose. As a general agent for the sale, in all matters within the scope of his agency, his authority is complete. No special restrictions or limitations of his powers, or directions as to the mode of their exercise, will affect their buying from him without notice, but, if he steps outside of the scope of his agency, if he undertakes to affect the principal's title in any way other than by a sale, he is acting without authority, and his act passes, any more than if he had been a mere depos-

A factor for the sale of goods can not, therefore, use *them* for advances made on his own account. This is an established doctrine, both in England and America, and although there have been, at times, objections made by Judges against the justice of the rule, I have not been able to find a single case in which it is denied. *Patterson vs. Tash*, 2d Strange, 429. *Martini vs. Coles*, 1 Maule & Sel., 146. 5 John., 429. Story on Agency, sec. 113. Paley on Agency, sec. 21. 2d Kent, 627.

The case of *Martini vs. Coles*, 1 M. & S., 146, was a stronger case than the one at bar. Martini had consigned to Coles goods for sale; the *bill of lading* was to the factor, and he assigns, and the factor was a *large dealer on his own account*. The factor pledged the goods to Coles to secure a loan to himself, and afterwards became a bankrupt. It



was held by the whole Court that the plaintiff was entitled to recover.

It was contended in argument here that, admitting this to be the common law, it is a doctrine not suited to the circumstances of this State, and is not, therefore, within the scope of our adopting Act. The object of the rule is said by Bailey, J., to be, to encourage foreign consignors to send goods to England for sale. Surely, if it will have that effect, this is the very locality where its influence will be a great public good. Consignments from other States for sale here, in our great want of capital, ought to be encouraged, and the argument is directly in favor of, rather than against, the adoption of the rule. It is exactly suited to our circumstances.

It is said also, that the rule is repealed by 2179, of the Code, (Irwin's.) That section is in these words: "The principal may recover back money, paid illegally, or by mistake of his agent, or goods wrongfully transferred by the agent, *the* party receiving the goods having notice of the agent's want of authority or willful misconduct."

It will be noticed, in the first place, that this latter clause, which is the portion relied on, is, at best, but a negative pregnant. It does *not* declare that, in cases where the party receiving the property had no notice, the principal shall *not* recover.

The fact is, that the section is almost a transcript of section 437 of Story on Agency. The language of Story is: "If an agent tortiously converts the property of his principal, as if he sells or pledges it to a third person, without right or authority, the latter will generally be liable equally with the agent for the conversion." He then adds: "This doctrine applies in all cases, where the third person knew and participated in the illegal or unauthorized act of conversion." Judge Story does not say, nor does this doctrine of the Code say, that the third person will be liable in no other cases.

If the Code is to have that meaning, the whole doctrine of agency is altered. It applies as well to a special as to a general agent, and the law of Georgia is, that any person,

having the actual possession of personal property, as the agent of another, no matter for what purpose, can transfer to a third person a good title, unless that third person has notice of the agent's want of authority. We do not think the section has any such meaning. The whole, at least, of article 2, is to be taken together. Section 2168 had provided that the principal was bound, by all acts of the agent, within the scope of his authority. Section 2170 declares that, in special agencies, persons dealing with the agent, *should examine his authority*. Section 2111 provides that even the pawnee of a promissory note, without notice, is not protected against the true owner. We cannot believe that it was the intention of the Legislature, by the negative pregnant of section 2179, to contradict the express language it has used in other parts of the Code, and especially in the very article in which the section stands.

Our conclusion is, that section 2179 introduces no new rule. It authorizes a principal to recover back goods wrongfully transferred by his agent, in cases where the transferee had notice, but it does not change the rules regulating the rights of principals against parties dealing with special agents, or with general agents, who act beyond the scope of their agency. These cases stand upon the same footing as do cases where a general agent, with private instructions, disobeys those instructions, and acts improperly with the knowledge of the person dealing with him.

It may not be out of place here to say, that in the argument of this case, there seemed to be a misunderstanding of the rule, in cases of a general agent, as to the extent of his authority, and as to how far his acts bind his principal. A special agent is one appointed to do a single act, or several specified acts. Every man deals with such an agent at his peril, and is bound to take notice of the agent's instructions. Story on Agency, sec. 17. A general agent may either be clothed with power to do all the principal's business, of every character, or he may be one empowered to do all acts connected with a particular business or employment. Story on Agency, sec 17. Now, the rule as to how far the acts of

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a general agent shall bind his principal is, that he may bind him by any act *within the scope of his authority*. Code, 2168. He may do all acts proper for the accomplishment of the end, or such as are usual in matters of this kind. Story, Agency, sec. 60. But, he cannot bind the principal by an act outside of the object of his appointment. 2 Kent, 619. 3 Ross Leading Cases, secs. 150, 151.

2d. Section 2110 of the Code provides that delivery is essential to constitute a pawn. Indeed, delivery is the very essence of the bailment. At common law, therefore, incorporeal things, though they might be sold or mortgaged, could not be pawned. Story on Bailment, sec. 286. Hence the necessity of the special provision of the Code for the pledging of promissory notes and evidences of debt. Code, 2110. There need not, it is true, in all cases, be an actual moving of the thing, as if it be logs in a stream, or any other article usually delivered by transferring the dominion, but there must be such a delivery as the thing is capable of. The mere setting of a portable article aside, or the pledger consenting to bail it as the bailee of the other, there being in fact no transfer of the custody, however such acts might, in case of a sale, amount to delivery, is not sufficient in case of a pledge or pawn, the very essence of which is deposit. Boleman's Commercial Law, secs. 673, 674. Story, sec. 287, 288. Irwin's Code, 2110.

3d. While, perhaps, the language of Judge Cole is not technically accurate when he says that the facts here amount to *constructive* notice, yet we are clear that they are such strong evidence of notice as must bind the bank, whether because it must have wilfully shut its eyes, or because failure to know, under the facts, was such negligence as that it ought not to be protected, is immaterial.

Judgment affirmed.

Carswell vs. The Macon Manufacturing Company.

WILLIAM E. CARSWELL, plaintiff in error, vs. THE MACON MANUFACTURING COMPANY, defendant in error.

The Constitutions of 1861, 1865, and 1868, requiring cases in equity to be brought in the county where one of the defendants, against whom substantial relief is prayed, resides, does not apply to bills ancillary to suits already pending, which, for purposes of injunction, etc., may be brought in the county where such suits at law or equity are pending. When, however, the bill prays independent relief, not necessary to an adjudication of the matter involved in the original suits, the bill, as to that independent relief, is demurrable.

When an action was pending in Bibb Superior Court, in favor of a plaintiff, who resided in Wilkerson county, and the defendant filed a bill in Bibb, charging that the note sued on was given for two hundred and fifty bales of cotton, which the plaintiff had, by fraud and deceit, induced him to buy, but which, the day after the sale, was seized by the military authorities as Confederate cotton, and, by them sent out of the State, against the complainant's consent and efforts, but which he had followed to New York, and brought his action therefor in the United States Court, and had given notice of the action, which was still pending, to the vendor, and the bill prayed an injunction of the common law suit until the termination of the suit in New York:

1. That the bill was properly filed.

In such a case, the Judge may grant a temporary injunction, leaving the defendant his right to answer and move to dissolve, and to have such other proceedings taken as are usual in Chancery.

Equity. Injunction. Demurrer. Decided by Judge COLE. Bibb Superior Court. June Term, 1868.

On the 24th of February, 1856, the Macon Manufacturing Company, a corporation, bought of Wm. E. Carswell, of Wilkerson county, Georgia, two hundred and forty-eight bales of cotton, at the full market price, thirty-five cents per bale. They bought it to manufacture. They paid him \$100 00 in cash. The cotton was then in the warehouse of Lardeman & Sparks, in Macon, Georgia, and, after the sale, it was delivered to the company, and shipped to New York. Said cotton, (according to the information and belief of the company), was, in the fall of 1865, by one —, representing himself as an agent of the treasury department of the United States, seized, as the property of

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the government, and, after being sometime in controversy was released, and remanded to the possession of said Hardeman & Sparks, as bailees of Carswell. So it remained till February, 1866.

Before the sale to the company, it was again seized by one Clifton E. Wharton, as treasury agent of the United States, who, (as the company is informed and believes), claimed title by title paramount to Carswell's title. After some real or pretended investigation, Wharton released it on the 23d of February, 1866. This last release was procured by fraud, and by a bribe, paid by Carswell. The release was in two papers in writing, signed by said Wharton, as such agent, and dated 23d February, 1866, as follows:

"Permission is hereby granted Messrs. Hardeman & Sparks to ship (254) two hundred and fifty-four bales of cotton, present shipping marks W. E. C. & William E. Carswell, it having been shown that the above cotton is not the property of the United States Government," and "The embargo, placed upon the (254) two hundred and fifty-four bales of cotton belonging to William E. Carswell, is this day raised."

The company believed said release was *bona fide*, and supposed they were getting a good title to the cotton. Indeed, one of the directors of the company told Carswell, at the time, that they would not buy it unless the title was all right. After the company got possession under said purchase, one H. B. Titus, claiming to be the special agent of the United States treasury, seized said two hundred and forty-eight bales of cotton, as the property of the United States, and one Bogart, then commandant at Macon, ordered a squad of negro soldiers, of the United States army, to deliver the same. They arrested the President of the company, because he would not deliver the cotton, broke open the warehouse of the company, and violently took it. These United States agents shipped two hundred and forty bales of this cotton to Savannah. Said President went to Savannah, and obtained an injunction from the Superior Court of Chatham county, against the removal of the cotton. The military authorities at Savannah, disobeyed the injunction, and shipped the cotton to New York.

When it landed in New York, it was attached at the

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instance of the company, as their property. Thereupon, one Simeon Draper, as an agent of the United States, claimed said cotton for the United States, gave a replevy bond, and took possession of the same. The suit against Simeon Draper *et al.*, by the company, was removed to the United States Circuit Court, and is there pending. Though Carswell is aware of said suit in New York, he has offered no proof, as to title, to the company.

Nevertheless, Carswell sued the company for the balance of said purchase-money. He is aged and infirm, and has little available property, except his lands, the value of which is greatly depreciated, and the company believe he will be unable to respond upon his implied warranty of his title to said cotton. For these reasons, stated in their bill, filed in Bibb county, the company prayed that Carswell's suit in Bibb county be enjoined until the decision of their said suit in the United States Court in New York; that if it lost this, Carswell should refund all paid by it, etc. The bill was sanctioned. It was demurred to, upon the grounds that there was no equity in the bill, and because Carswell, living in Wilkinson county, the Superior Court of Bibb county had no jurisdiction over him. The Court overruled the demurrer, and retained the injunction till the end of the New York litigation. This action of the Court is assigned as error.

COBB & JACKSON, for plaintiff in error. The company has a complete remedy at law. *R. M. Charlton's Ga. R.*, 497; 2 *Kelley*, (*Ga. R.*), 154, 305; 11 *Ga. R.*, 33; 19 *Ga. R.*, 134; 20 *Ga. R.*, 345; 24 *Ga. R.*, 608; 26 *Ga. R.*, 167; 30 *Ga. R.*, 170; 3 *L. Cases in Eq.*, 184; Code, secs. 3040, 3152. The New York suit creates no equity. Story's *C. of L.*, 610.a.; 9 *John R.*, 221; 12 *John R.*, 99; 7 *Tenn. R.*, 470; 3 *Sumner, R.*, 165; Code, sec. 3028. The Superior Court of Bibb has no jurisdiction. 3 *Kelly* (*Ga. R.*), 575; 4 *Kelly*, (*Ga. R.*), 571; 12 *Ga. R.*, 77; 19 *Ga. R.*, 501; 20 *Ga. R.*, 379; 22 *Ga. R.*, 190; 23 *Ga. R.*, 415; 29 *Ga. R.*, 35, and the Constitutions of Georgia of 1861, 1865, and 1868.

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J. J. & T. B. GRESHAM, B. HILL, for defendant in error cited 23 *G. R.*, 414; 29 *Ga. R.*, 34; Code, sec. 4124, as to jurisdiction. 6 *Ga. R.*, 458; 7 *G. R.*, 384; 9 *Ga. R.*, 430 Irwin's Code, sec. 2591, and 2 John's Ch. R., 204, as to fraud. 1 Story's Eq., 82-83; 3 Atk. R., 262-3, as to multiplicity of actions, etc. 16 *G. R.*, 378; 29 *Ga. R.*, 490, and 30 *Ga. R.*, 20; 35 *Ga. R.*, 216; Code, secs. 3141-3153.

McCAY, J.

1. The constitutional provision, requiring "equity causes" to be brought in a county where one of the defendants against whom substantial relief is prayed, resides, is to be construed in the light of the history of the law on that subject in this State.

This Court, in the case of *Gilbert vs. Thomas*, 3 *Kelly* 575, decided that the Constitution of 1798, did not, by the words "civil cases," cover suits in equity, and that the provision therein, that all civil cases should be tried in the county of the residence of the defendant, did not, *ex vi termini*, include equity causes.

By analogy, however, to the rule thus fixed by the Constitution for civil cases, the Court then intimated that, even in equity, a party should not, without good reason, be dragged out of his county to answer a complaint. In 4 *Kelly*, 571 in the case of *Rice vs. Turner*, this doctrine is repeated, and the general rule announced that courts of equity will, in analogy to the rule fixed for civil cases, require equity suits to be brought in a county where one of the defendants resides unless there be some other equity, authorizing a different course.

Subsequently, in 15 *Ga. R.*, 77; 16 *Ga. R.*, 456; 18 *Ga. R.*, 678; 19 *Ga. R.* 501; 20 *Ga. R.*, 381; 21 *Ga. R.*, 454 22 *Ga. R.*, 190; 23 *Ga. R.*, 414; 27 *Ga. R.*, 178; 29 *Ga. R.*, 34, and in some other cases, the Court, in substance, established the following propositions:

1st. That in analogy to the rule at law, equity causes must be brought in a county where a defendant resides against whom substantial relief is prayed.

2d. That this rule does not apply to bills ancillary to suits at law, as for discovery, injunction, etc. In such causes, so far as the bill is merely defensive, and seeks no relief, outside of the suit pending, the county where the suit is pending has jurisdiction.

The Constitution of 1861, adopts the following provision : "All equity causes shall be tried in the county where one or more of the defendants reside, against whom substantial relief is prayed." The Constitution of 1865, uses the same language. The Constitution of 1868, is as follows: "Equity cases shall be tried in the county where a defendant resides, against whom substantial relief is prayed."

We do not think the Constitution intends any more than this: To make a constitutional provision of what before rested in the decisions of the Courts.

In some senses, perhaps, these ancillary proceedings may be called equity causes; but, in a striking sense, they are not. They depend upon, and are merely in aid of a common law issue. They are necessary proceedings to get at the true rights of the parties in the matter pending in the common law tribunal.

So far as such bills are thus confined, we hold they may be brought in the county where the suit is pending. If they seek other relief, become aggressive, instead of simply defensive, they are, so far, demurrable. This bill seeks only to *enjoin* the common law suit in Bibb; it asks no relief independently of that. And we think the Superior Court of Bibb has jurisdiction for that purpose.

2d. We think the complainant sets forth good reasons why the injunction should be granted. He alleges that he bought this cotton on the faith he had in Carswell's statements; that, in fact, those statements were untrue; that the United States had seized the cotton, claiming that it was forfeited by Carswell's acts. We do not think the fact that the proceedings are in another jurisdiction alters the case.

This company has bought this cotton, and given a note for it. An adverse title is set up to the cotton, and the company, on this claim, lost the possession. Is it equitable that

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the company should pay the money, until this controversy is settled? Perhaps they may lose it, even with the best defence they can make. Clearly, then, they would be entitled to recover back the very money now sought to be recovered of them.

This will be trifling with the Courts. We see no hardship in compelling Carswell, who, by the bill, is charged with deceit, and who, by his deceit, led the complainant into this difficulty, to wait for his money till it is settled. It would be to give a permission to fraud and deceit, to permit him, by such deception as this bill charges, to throw the burden of his sins upon this complainant.

It is not necessary that this bill shall allege and show that the title of the United States is good, or state, as *facts*, the ground of the adverse claim.

The bill states that the claim is *bona fide* made and prosecuted; that Carswell knew it at the sale; that he not only gave no notice of it, but did affirmative acts of deceit, to hide it, and thereby mislead the complainant. We hold this to be sufficient.

The company is entitled to the cotton, has a right to its bargain, and is not required to make out such a case here, as will show that the United States ought to recover it. Carswell has no right to put them in that position. For that reason, they do not have at present a full defence at law. At law, they would be compelled to allege and prove that the United States had the right to the cotton, and thus, in effect, give up the cotton; perhaps, it is worth more than when they bought it. At any rate, they have, as against Carswell, a right to the cotton, and it would be unjust to compel them, under the facts charged in this bill, either to pay this money, or, by pleading that it belongs to the United States, give up their interest in it, which, if they can succeed in their suit, may be much more than the price they agreed to pay for it. The prayer of this bill is, simply, that this suit, on the notes, may be enjoined until the termination of the proceedings instituted by the complainant to recover the cotton. The Chancellor will always have *this* proceeding in

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control. If the suit for the cotton is not prosecuted, in good faith, and with due diligence, if it be dismissed, or there be collusion, it will be always in the power of the Chancellor to remove the bar to the common law suit.

The injunction granted by the Judge, sanctioning the bill in this case, is subject to the same proceedings as other injunctions so granted. The defendant may answer, and if he shows there is no equity in the bill; that is, that there is no *bona fide* litigation, and no act done by him to mislead the complainant on the sale, he will be entitled, as in other cases, to have it dissolved. There must be a decree as in other cases, and the decree, when made, should carefully protect the defendant in the bill, against any want of *bona fides* in the complainant, in the prosecution of his rights to the cotton. The decree should also distinctly provide that its operation should continue on the recovery of the cotton, or at the further order of Court.

Judgment affirmed.

MACON AND WESTERN RAILROAD COMPANY, plaintiff in error, vs. MARGARET A. JOHNSON, defendant in error.
The same parties *vice versa*.

If a passenger on a railroad be injured by a collision of the trains, and the evidence shows that, though the company (or its agents), were guilty of negligence, yet the party injured could, by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company.

If, in such a case, it appears that both the defendant and the plaintiff were guilty of negligence, and it does not further appear, from the evidence, that the deceased could, at the time of the injury, have avoided the consequence to himself of the negligence of the railroad company, or its agents, he is entitled to recover; but it is the duty of the jury to lessen the amount of their verdict in proportion to the negligence and want of ordinary care of the passenger.

Where a suit is brought by a widow, for the homicide of her husband, under the 2920th section of Irwin's Code, and there is no fault proven

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on the part of the deceased, the rule to be adopted for estimating the damages, is: The pecuniary damages to the wife from the homicide, to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects in life, and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well established reputation.

4. The opinion of one, who for many years has been a railroad superintendent, in a matter within the scope of his employment, stands upon the footing of the opinion of an expert; but he cannot give his opinions of the object of a railroad company, with which he had no connection, in putting up a particular notice on the doors of its cars.
5. Though opinions are not generally evidence, yet, when the truth sought to be ascertained is matter of opinion, a witness, not an expert, may give his opinion, if he states the facts upon which it is based.
6. A card published by the passengers immediately after a railroad collision, is not evidence, as part of the *res gestæ*.
7. Railroad companies may make reasonable rules for the conduct of their passengers, and a rule that passengers must not stand upon the platform of the cars, is such a reasonable regulation.
8. If such a notice be proven to have been posted in large metal letters, upon the doors of the passenger cars of a railroad company, a passenger will be presumed to know the rules, and if that knowledge be denied, the burden of establishing such want of knowledge is upon the party denying it.
9. In this case, this Court feels constrained to reverse the judgment of the Court below, overruling the motion for a new trial, made by the plaintiff in error, on the ground that the Court erred in its charge to the jury, as to the rule for estimating damages in such cases, and on the further ground, that the verdict of the jury was decidedly against the weight of evidence, if not as to the absence of ordinary diligence on the part of the deceased, to escape the consequence to himself from the plaintiff's negligence, certainly as to the amount of the damages, in view of the rule that where both parties are at fault, the damages are to be diminished in proportion to the negligence and want of ordinary care of the party injured.

Case. Motion for new trial. Decided by Judge COLLETT. Bibb Superior Court. November Term, 1867.

Arthur W. Johnson was a passenger upon the night passenger train from Macon to Atlanta, over the railroad of said company. That train was followed by a freight train.

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the portion of its engine having broken, the passenger train was stopped. Whilst it was stopped, Johnson stood on the platform of one of its cars, and there remained till a freight train, running into the passenger train, killed him. Thereupon, his wife sued the company for damages. The main question being, who was in fault, the parties produced the evidence of very many persons. The plaintiff undertook to show that these trains were out of schedule time; that the officers of the company had violated some of its rules, and that the signal-man, sent back to give notice to the freight train, had gone back too short a distance, etc. On the other hand, the company undertook to show that Johnson was drinking; did show that he stood upon the rear platform of the rear car of the passenger train, etc. One of the witnesses said: "It is my opinion Johnson could not have been in his seat at the moment of collision, but was at the rear platform or on the platform." The plaintiff's attorneys objected to his answer as evidence, but the Court received it. It was shown that on the doors of each passenger car was a plate, with raised letters, as follows: "*Passengers must not stand on the platform.*" GEORGE W. ADAMS, who had long been conversant with other railroads, but who was never employed on the Macon and Western railroad, was allowed, over the defendant's objection, to testify that on railroads to which he had been connected, the object of such notices on the doors of the passenger cars, was only to keep passengers off the platforms when the train was in motion. He testified that a collision could not occur where both trains were off schedule time, without fault on the part of the railroad company. This, too, came in over the defendant's objections. None of the passengers who were inside the cars were damaged seriously, if at all, and quite a number of the witnesses testified that they believed that had Johnson been in his seat, he had not been injured. To these opinions, the plaintiff objected, but her objections were overruled. But the defendant proposed to read, from the answers of some of its witnesses, that "it was the general opinion of passengers that all was done that could be done to prevent the

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accident, and that there was a card issued and signed by many of the passengers, exonerating the agents of the company from all blame," the Court rejected that answer.

The card alluded to was in the following words:

"A CARD.

"MACON AND WESTERN RAILROAD, October 27th. 1865.

"We, the undersigned, passengers of the train which left Macon on the night of the 26th of October, and which train was run into by a freight train following, causing the death of A. W. Johnson, of Baker county, and wounding A. J. Rogers, after careful investigation, we feel satisfied that the conductors, engineers, and men on the train, did all in their power to prevent this accident."

"The unfortunates were on the platforms of the first and second passenger cars. None others were injured seriously. We have great reason for gratitude for so marvelous an escape from instant death."

It was signed by seventeen of the male passengers. It had been published in the Macon Telegraph, and the original had been lost. It was made and signed on the spot, just after the catastrophe, but how long after, did not appear. (The company's attorneys, in the bill of exceptions, say it was fifteen or twenty minutes after the catastrophe.) Under these circumstances, they offered it in evidence, but the Court refused to allow it to be read to the jury.

We pass to the question of the amount of damages.

The plaintiff's attorneys asked a witness the following questions: "In your answer to a former set of interrogatories propounded to you by plaintiff, you stated that you thought the services of Arthur W. Johnson were worth \$1,500 00 or \$2,000 00 *per annum*, did you mean to say that his services were worth that sum, exclusive of the support of his family?" The question was objected to as leading. The Court held it was not leading, and the witness answered that he meant he could make that much "clear of the support of his family."

Johnson was shown to have been between thirty and thirty-four years old when killed; most of the witnesses said about thirty-four. He had been a merchant, etc., and the witnesses who testified as to his income, put it from \$1,500 00 to \$2,500 00 *per annum*.

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ns of his property for taxation, made by himself, of years, were as follows :

.....\$ 865 00	For 1861,.....\$14,715 00
..... 530 00	“ 1862,..... 13,590 00
..... 1,300 00	“ 1863,..... 18,612 00
..... 2,900 00	“ 1864,..... 24,760 00
..... 3,950 00	“ 1865,.....No Return.
..... 10,987 00	“ 1866, his estate, 4,450 00
..... 13,044 00	

ntory of the real and personal estate, made by trators, footed up \$4,801 50. He acquired some; marriages. Two witnesses estimated this as high 0, another said \$2,000 00, by his first marriage, d not know how much by his second, which 186—. He was shown to have been industrious, oits generally, etc.

at the *quantum* of damages from these *data*, JOHN MAN and CHARLES T. McCAY were examined as boardman testified that he had been, since 1854, a ce agent; had examined “Bartlett’s Commercial d found them correct; that it contained a table of which was correct, and recognized as authority; ere founded on the Carlisle Tables, which were at Carlisle, England, and generally received as y insurance men; that from these tables, count- t at seven per cent., and allowing nothing for nual income being added to the capital, he calcu- value of the life of a healthy man, thirty-four upon an annual income of \$2,000 00, to be \$22,- : \$700 00 income, to be \$7,962 35; of \$50 00 be \$568 73.

F. McCay’s testimony was as follows: The first s to show his experience, etc., in such calculations, pponse to it, was as follows: “I was professor of s in the University of Georgia, and in the State South Carolina for many years, and since 1849, ctuary or mathematician to The Southern Mutual

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Life Insurance Company. While I was at Athens and Columbia, I had the libraries enriched with all the standard works on the statistics of human mortality, and devoted much attention to the subject. I prepared, at various times, articles on these subjects, for Hunt's Merchant's Magazine, which have received commendation from the best judges in the United States. Last year, I was invited by the superintendent of the Insurance Department of the State of New York, to give him my opinion of the proper method for valuing the liabilities of their Life Insurance Companies, for my answers to which, I have received his thanks, and I subjoin the approval of the same from Mr. Bradley, actuary of the Mutual Benefit Life Insurance Company, which is one of the largest in the Union. I regard myself, therefore, as qualified by my education and studies, to give reliable answers to any question connected with life contingencies, especially in the South, where the rate of mortality is probably greater than in the North, as is shown by the experience of the Southern Mutual Life Insurance Company, to which I have devoted careful attention:

“NEWARK, N. J., March 27, 1866.

“HON. WILLIAM BARNES:

“DEAR SIR:—I only saw, and for the first time, a few days since, your circular as to the method of valuing policies. I think the first answer of Mr. McCay is one of the best considered and simple statements of the matter I have seen. It corresponds very closely with my own views. The formula of obtaining values used by me, is

$$V = 1 - \frac{1 + a_{m+n}}{1 + a_m}$$

“I first prepare a table of logarithms of $1 + a_x$, got by the formula $1 \log. N_{x-1} - \log. D_x$. The calculation is then easy and very accurate.

“This formula, of course, gets the value of the policy at the age $m+n$, when the premium is just due, and not yet paid.

“Yours truly,

JOSEPH P. BRADLEY.”

the second interrogatory was: "A person is killed by running of railroad cars on the road, who is thirty-four years old, and who has a family that he supports; his services worth, annually, to his family, say from \$1,500 00 to \$2,000 00; that is, his services produce, annually, the average of these sums. Now, what sum in gross, would, in money, be equivalent to those depending on such person for the loss of his life?"

Answer.—"The answer to this question depends, I think, on several other things besides the value of an annuity on the life of the deceased; for 1st, if the deceased had lived, his earnings would be partly consumed in his own support; 2d, the earnings would not probably be continued the same until the end of life—as when old age had overtaken him he would not be as able to labor.

As to the first, the share that would have been consumed in his own support, I would remark that when a man's income is \$1,000 00, four, five, or six hundred dollars, all is usually consumed in the support of himself and family, and about a fourth or fifth of this, is usually his own expense. If he receives \$1,000 00 or \$1,500 00, he spends more, but lays up something.

If he earns a larger sum, his savings are usually larger. His expenditures on his own support, when he receives \$2,000 00, are probably less than a fifth. But I shall estimate them at a fifth in my calculation.

As to the second question—when his earnings would probably cease. I think at the age of sixty, is a fair supposition. When an income depends on manual labor, it lasts usually till near this age. Where it comes from brains or mental skill or dexterity, it lasts till after sixty.

Counting, now, the mortality of Georgia at such a percentage above the European as I believe justified by experience; counting interest at seven per cent. per annum; counting the deceased's income at \$2,250 00, the average of the \$2,000 00, and \$3,000 00 named in the question; counting his income to cease at the age of sixty; counting his portion of expenditure for his own support at one-fifth of his

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whole income, and counting that to be expended for his whole life, I find the loss to his family to be \$17,672 00. If the jury shall be satisfied that his income is a larger or a smaller sum, this loss to be increased or diminished in proportion."

Third Interrogatory.—"In making this calculation or estimate, do you consider the question as equivalent to the purchase of a life-annuity of such person for same sum, or what is the difference?" *Answer.*—"I do not consider, for the reason already given, the value of an annuity of \$2,250 00 for his life, the true measure of the pecuniary loss to his family. The value of such annuity would be \$26,356 00."

Fourth Interrogatory.—"Would a sum of money, in gross, that would produce a certain life-annuity for such person for same sum, compensate pecuniarily for the loss of such life? If not, what is the difference, and why?" *Answer.*—"I think such a sum of money as would produce an annuity of \$2,250 00, would more than compensate his family, for various reasons already given."

Fifth Interrogatory.—"In a life-annuity, the recipient takes the money himself, at the end of the year, and makes such disposition as he thinks proper. Now, in compensating for the loss of the life stated, ought not the consideration to increase the compensation that this person, whose intellect, capacity, and sagacity produces this sum in life, and puts into his business annually, increasing, to this extent, his profits and benefits to his family, while no such consideration affects the price for an annuity producing a like sum, and if this is true, what sum is equivalent to this additional consideration?" *Answer.*—"If the deceased had extraordinary skill in money matters, the jury would be justified in increasing my estimate. I merely count money worth legal interest."

As to Bartlett's Tables, etc., he said he knew nothing of them, and that no old tables, as the Northampton, Carlisle, or Swedish, nor modern tables, as "Dr. Farr's English," founded on the mortality of England and Wales, would suit exactly for the latitude of Georgia.

Upon cross-examination, he answered: "The constitution

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health of a person have much to do with the duration of life. My calculations above are based on the average of the whole community, good and bad. The English tables of Mr. Farr are based on the whole population, sick and weak and sound. My table of mortality is higher than this, because of our Southern latitude, nearly twenty per cent."

"I think a reliable estimate can be made of the value of human life on one's life without knowing his constitution. The deceased was in good health—not meaning by this perfect health, or free from every complaint or disorder—not the average health of the whole population of the country. I consider that his loss to his family was worth, at the sum named in my direct answer, \$17,762 00, and his valuation is founded on principles perfectly reliable. If the jury shall be satisfied that the deceased was in bad health, then I withdraw my calculation as not applicable. If he was in good health, whatever was his constitution, I consider my calculation reliable. Millions and tens of millions of money are invested in the United States on just such calculations, and they are as safely invested as if put into government or railroad bonds."

To the 3d cross-interrogatory he answered: "It is usual to require a medical examination of any person who applies for insurance, or a life-annuity. But it is not usual to reject an application for slight disorders. I have had my own life insured when my application showed that I had been much troubled with dyspepsia, and without any extra charge. Asthma, and hernia, and other diseases of slight character, do not prevent the acceptance of an applicant. The tables of mortality which insurance companies use, include such persons. If only the perfect cases were taken, the tables of mortality would be below their tables and calculations."

To the 4th cross-interrogatory he answers: "I have no personal knowledge of the income or health of Arthur W. Johnson. I only say, in my answers above, that, if he was in good health, and *thirty-four* years of age, and had an

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income of \$2,250 00 a year, the pecuniary loss to his family was \$17,672 00, (seventeen thousand six hundred seventy-two dollars.)”

To the 5th cross-interrogatory he answers: “I have nothing to add in favor of defendant, as I had nothing to add in favor of plaintiff. Knowing none of the parties answers relate only to abstract scientific questions, with no reference to particular individuals.”

The evidence being closed, the Court first gave to the jury a general charge, as follows:

This case is brought by plaintiff to recover of the defendant, damages for the killing of her husband, while a passenger on the cars of defendant. You have heard the evidence and you are to determine the case from the evidence and the law as I shall give it to you. You are the sole judges of the evidence, and you are to sift it, and weigh it, and apply the law. If there is a conflict in the evidence, you are to reconcile it, and make it harmonize if you can. But if you cannot harmonize it, then scrutinize it, and give your credit to that part that is best sustained by other witnesses, giving to the evidence of the witnesses that had the opportunity of knowing, and are sustained by the greater weight of other evidence.

Again, you are to disregard any and every consideration but the law and evidence. You are to be blind as to who are the parties, where they reside, or what are their connections. Make your verdict speak the truth from the law and the evidence as submitted to you.

This defendant was a carrier of passengers, and was bound to extraordinary diligence on behalf of itself and agent to protect the lives and persons of its passengers. The defendant was obliged to furnish good and substantial and safe engine and cars, and good, competent and skillful engine and other officers, agents and servants. If the defendant fails to furnish all these, and a passenger is injured in consequence thereof, the defendant is liable to the passenger for such damages as he can prove he has sustained.

If the jury believe, from the evidence in this case, that

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husband of the plaintiff was killed by the neglect of the defendant in providing any of these things; or, if they believe from the evidence, that the husband was killed by an extraordinary and unforeseen collision, which was the result of the negligence or want of diligence on the part of defendant, or its agents, and without any want of ordinary care on the part of the husband who was killed, then the plaintiff is entitled to recover. But the defendant is not liable to this plaintiff for the death of her husband, if the defendant has used such diligence as the law, as above given you, requires.

If you believe, from the evidence, that the plaintiff's husband was killed by his own negligence, or, if you believe he was guilty of gross negligence, then she, as his wife, is not entitled to recover. A railroad company is not liable for loss occasioned by a collision of its trains, if the company and its agents have used the extraordinary care required by the law, and the party injured was guilty of gross negligence, or could have avoided the injury by exercising such care and prudence as a prudent and careful man will exercise to avoid danger.

Again, I charge you, that the passengers on the cars are bound to conform to reasonable regulations, and if notice is given to them not to stand on the platform, they are bound to conform to the notice. This notice is given by being posted over the platform, and is given to notify passengers that the platform is a place of danger. The passenger being on the platform, may or may not prevent his recovery of damages while standing there. If the injury was the result of negligence of the company, or its agents, the injured passenger may recover, if he used ordinary care in trying to avoid the injury—but if he neglected to use such ordinary care to escape the injury, he is not entitled to recover.

If the plaintiff, by ordinary care, could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover.

No person shall recover damages from a railroad company for injury to himself, where the same is done by his consent, or is caused by his own negligence. But if the plaintiff and

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the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him for his negligence.

He read from *Red. on R.*, 333 ; from *Pierce, Am. R. R. L.*, 475 ; 28 *Ga. R.*, 116 ; *Code*, secs. 2040, 2979, 2035, 2913, 2914 ; 24 *Ga. R.*, 366.

By the plaintiff's attorney, he had been requested to charge as follows :

1st. That a railroad company, in this State, is liable for any damage done to persons or property by the running of the locomotives and cars of such company, or for any damage done by any person in the employment or service of such company, unless such company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption, in all cases, being against such company. *Code*, sec. 2978. A carrier of passengers is bound also, to extraordinary diligence on behalf of himself and his agents, to protect the lives and persons of his passengers, and in case of accident and injury therefrom, it is incumbent on the company to show that such diligence was used, or they are liable. *Code*, 2040.

2d. That, if it appears from the evidence that there was a collision of trains on defendant's road as charged, and that the death of plaintiff's husband was produced thereby, the facts of collision and injury therefrom make out a *prima facie* case for the plaintiff, and cast the onus on the defendant to show that such collision was not the result of negligence, but was the result of unavoidable necessity, which the utmost skill, care, and foresight could not have prevented. *Stokes vs. Salstanstall*, 13 *Peters*, 191.

3d. A common carrier, in this State, cannot limit his legal liability, either by publication on the doors of cars or elsewhere, or by entry on receipts or tickets sold. He may make an express contract, and will then be governed accordingly. *Code*, 2041, 3280.

4th. If, by the rules of this road, (see rule 18, in rule book), conductors have the entire management of the trains

the hands employed upon them, and the jury believe, the evidence, that the conductor told the passengers "there was no danger, that a man had been sent back on the rear train, and that all was safe," a failure on the part of said passengers to notice and obey warning given by the conductor (if such warning was given), does not show that such passengers were negligent of their own safety, or that they were not using ordinary caution; that the train and passengers were under the exclusive management, care and control of the conductor, it is his duty to give the passengers notice of real or apprehended danger, if in his power to do so; if the conductor fails to warn passengers under such circumstances, it does not show a want of ordinary care on the part of the passenger, if he neglects to place himself in a position to avoid a collision or a danger that is unknown or unseen to himself, upon the expressed apprehensions of other passengers, or of persons whom he does not know have authority over the train, or superior knowledge to himself, and of the reasons for such apprehension of danger he is ignorant.

In such a case, the passenger has a right to believe that the conductor is well informed, and would, if there was real danger, notify his passengers of such danger, and take care for their safety. Laing vs. Colder *et al.*, 2nd Am. Railway Cases, 380; Pierce Am. R. R. Law, 475.

1. Common carriers of passengers are responsible for the slightest negligence resulting in injury to their passengers, and are required, in the preparation and management of their means of conveyance, to exercise the highest degree of skill and diligence which a reasonable man would use in similar circumstances. A railroad company is bound to provide skillful and careful servants of good habits, and, in every respect, competent for the posts they are to fill, such as engineers, brakemen, conductors, and signalmen, and is responsible not only for the possession of such care and skill, but also for the continued application of those qualities at all times. Pierce Am. Railroad Law, 470; Stokes vs. Salstan-son, 13 Peters, 181; Laing vs. Colder *et al.*, 2 Am. Railway Cases, 381. And any failure to exercise the highest degree

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of skill and diligence by such servants, when in the regular course of their employment, whether from a want of skill, or an omission to exercise it, is gross negligence, and will render the company liable for any injury resulting to a passenger, although such servant may have, at the time, acted in disregard of the rules of the company, or in violation of express orders. *Philadelphia and Reading Railroad vs. Derby* 14 Howard, 486.

6th. If there was imminent danger of a collision, and the conductor of the passenger train had reasonable ground to apprehend one, it was his duty to give notice to the passengers of his train of the approaching danger, and put them upon their guard, and more especially if his train was not in motion, and if the passengers had sufficient time to make their escape. The failure to give such notice was negligence for which the defendant, in whose employment he was, is responsible. *Laing vs. Colder et al.* 2 Am. Railway Cases, 381. *Redfield on Railways*, 327, and note.

7th. If the plaintiff's husband was lawfully upon the railroad of defendant's as a passenger, to be safely and securely conveyed as such passenger from Macon to Atlanta, and while so conveying him the collision occurred by which the plaintiff's husband was killed, the defendant is liable for the injury.

8th. If the collision by which the plaintiff's husband was killed, was occasioned by the failure of the signalman sent back to warn the rear train, to go far enough back to stop it and prevent disaster, and said signalman had sufficient time for that purpose, the defendant is liable, although at the time he may have acted in violation of the orders of the conductor.

See charge of Mr. Justice Greer, *Philadelphia and Reading Railroad vs. Derby*, 14 Howard, 470.

9th. The plaintiff's husband, in traveling upon defendant's train as a passenger, was not bound to anticipate or provide against danger not ordinarily incident to that mode of travel, or to place himself where he would be least exposed in case of a collision of trains. (*Willis vs. Long*

Island R. R., 32. Barbour, 399,) and that *ordinary care* which every one is required to take of their persons to escape the consequences of another's act, is not such care as a very prudent or cautious person would take under different circumstances, but only that degree of care which may be reasonably expected from a person in the situation of the person injured, at the time of the injury; and if the plaintiff's husband had been assured by the conductor, or other agent of the company, just previous to the accident, that there was no danger, the jury are authorized to consider whether such assurance was or was not sufficient to quiet the apprehensions of a reasonable man, and cause him to neglect precautions he might otherwise have taken for his own safety. See *Beers vs. Housatonic R. R. Co.*, 2 Am. Railway Cases, 114.

10th. The question of negligence is not a question of law, but one of fact, upon which the jury are to pass in making up their verdict; and if they believe, from the evidence, that the defendant's servants were grossly negligent on the night in question, and might have prevented the disaster by the exercise of proper care, skill and diligence, and have prevented loss of life by giving proper and sufficient warning to the passengers, and failed to do so, the plaintiff is entitled to recover, although her husband may have been guilty of slight neglect. See case referred to above. Also, *Davis vs. M. & W. R. R. Co.*, 27 Ga., 113.

AS TO DAMAGES.

The widow is entitled to recover such damages as she has sustained by the loss of her husband, as well as such damages as the child or children may have sustained by the loss of their father, as against the person or corporation causing his death. Code, 2913. And if the jury believe, from the evidence, that the plaintiff is entitled to recover, they may give such damages as will compensate fully the plaintiff for the loss of her husband, which is *the whole value of his life*; they are to take into consideration, in computing the damages, what his life was shown to be worth by the

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proof—the probable accumulations of a man of his habits, health, position in society, and pursuits, calling occupation. If they can find a better rule, they are at liberty to adopt it. *Pierce on American Railway Law*, Penn. R. R. Co. vs. McClosky, 23 Penn. State Rep., 187. Independently of the damages thus computed, the plaintiff is entitled to damages for the loss of the care, protection and assistance of the husband and father. *Paulk's case* Ga., 369.

In this case the widow recovers “*for the homicide*” of her husband; the *damages* for which the right of action is given her, is *not the loss to her as wife* of the deceased, but *damages caused* by the wrongful killing of her husband. The modification of the Act of 1850, (which vested the right of action in the administrator, and in case of insolvency appropriated one-half of the recovery to the payment of debts of the deceased,) by the Act of 1856, and by section 2913 of the Code, was not intended to *confer a benefit on the wrongful slayer*, but *on the widow*, in the first instance, and if no widow, or if dead before final recovery, then on *the estate or children* of the deceased.

All these requests he charged, except the third.

The Court had been also requested, by the defendant's attorney, to charge as follows:

1st. If the jury shall believe the defendant, through his agents, exercised the extraordinary care and diligence required by law, to prevent the collision, the plaintiff cannot recover.

2nd. If the jury shall believe that the defendant was negligent, but that the deceased could, by ordinary care, have avoided the consequences to himself, caused by the defendant's negligence, the plaintiff cannot recover.

3d. If the jury shall believe that both the defendant and the deceased were negligent, and the deceased could not, by ordinary care, have avoided the consequences to himself, caused by the defendant's negligence, then the plaintiff may recover the damages, but they must be diminished in proportion to the amount of default attributable to the deceased.

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4th. If the jury shall believe that the collision was caused by the negligence of the defendant; but that at the time of the collision the deceased was standing on the platform of the cars, and did not have notice of the approaching train, then the damages must be diminished, in proportion to the default attributable to the deceased.

5th. If the deceased, at the time of the collision, was standing on the platform, and had notice of the approaching train, and of the danger of a collision, and refused or neglected to abandon his exposed position when he could have done so, then the plaintiff cannot recover, and the jury, under their oaths, must return a verdict for the defendant.

AS TO DAMAGES.

1st. If the jury shall believe the plaintiff is entitled to recover—she can not, as widow, recover from the defendant, more than, as a wife, she was entitled to receive from her husband, and under the law, she is entitled from her husband to support and maintenance according to the position and circumstances of the family in life.

2d. If “income” is the proper basis for the measure of damages, it is not a speculative or uncertain income, but a fixed income, based on the value of the deceased’s services; and the rule for ascertaining the present value of a fixed and certain annuity, can not be applied to ascertain the present value of a speculative and uncertain income from trade.

All of which charges the Court gave as requested, except those “as to damages,” which he refused, and charged, upon that question, as requested by counsel for plaintiff.

The verdict of the jury was for the plaintiff, for \$7,775 00 and costs.

Thereupon each party moved for a new trial. The company complained that the Court erred, 1st. In holding that said interrogatory was not leading. 2d. In admitting said opinions of Adams. 3d. In rejecting the answer as to the general opinion of the passengers, etc. 4th. In rejecting said published card. 5th. In refusing to charge, as requested by them, as to damages, and in charging on that subject as

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requested by plaintiff's attorneys. 6th. In saying, several times during the charge, "what gives me most trouble in this case is the question of damages." And lastly, because the verdict was contrary to evidence, etc. The record does not show that the Court used the remark quoted in the sixth ground.

Plaintiff's attorneys moved for a new trial upon the following grounds, to wit: Because the Court erred—

1st. In admitting to be read to the jury, as evidence against the objection of plaintiff, the statement of the witness William H. Whitfield, "I do not suppose Messrs. Rogers and Johnson would have been hurt had they done likewise," (kept their seats).

Also, the statement of the witness, James W. White, against their objection: "It is my opinion he (Johnson) could not have been in his seat at the moment of collision but was at the door, or on the platform." And also, allowing all and any like statements of opinion of the other witnesses against the objection of plaintiff.

2d. In rejecting the written opinion of Professor Charles F. McKay, as to the measure of damages, and mode of ascertaining the same. (This must mean in not adopting, in the charge, for, as evidence, it was not rejected).

3d. In charging the jury, "If the jury believe, from the evidence in the case, that the husband of the plaintiff was killed by an extraordinary and unforeseen collision, which was the result of the negligence or want of diligence on the part of the defendant, and *without any want of ordinary care on the part of the husband who was killed*, then the plaintiff is entitled to recover." The Court should have charged the above principle, leaving out the words italicised. The Court also erred in still further qualifying said principle by adding thereto, "but the defendant is not liable to this plaintiff for the death of her husband, if the defendant has used such diligence as the law, as above given you, requires."

4th. In charging the jury, "If you believe, from the evidence, that the plaintiff's husband was killed by his own negligence, or if you believe he was guilty of gross negli-

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3. then she, as his wife, is not entitled to recover. A road Company is not liable for loss occasioned by a collision of its trains, if the company and its agents have used extraordinary care required by the law, and the party injured was guilty of gross negligence, or could have avoided injury by exercising such care and prudence as a prudent careful man will exercise to avoid danger.

4. In charging the jury, "Again, I charge you that the conductors on the cars are bound to conform to reasonable regulations, and if notice is given to them not to stand on platforms, they are bound to conform to the notice. The danger being on the platform, may or may not prevent his recovery of damages done while standing there. If the injury was the result of negligence of the company or its agents, the injured passenger may recover, if he used ordinary care in trying to avoid the injury, but if he neglected to use such ordinary care to escape the injury, he is not entitled to recover; if the plaintiff, by ordinary care, could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover.

5. In refusing to charge the jury, as requested by plaintiff's counsel, in writing, "That a common carrier in this State cannot limit his liability, either by publication on the cars or elsewhere, or by entry or receipts, or by a bill of lading sold. He may make an express contract, and then he is governed accordingly."

6. In charging the jury, "That, if the jury shall believe that the defendant, through his agents, exercised the extraordinary care and diligence required by law, to prevent the collision, the plaintiff can not recover."

7. In charging the jury, "That, if the jury shall believe that the defendant was negligent, but that the deceased could, by ordinary care, have avoided the consequences to himself, and that by the defendant's negligence, the plaintiff can not recover."

8. In charging the jury, "That, if the jury shall believe that both the defendant and the deceased were negligent, and that the deceased could not, by ordinary care, have avoided the

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consequences to himself of defendant's negligence, then plaintiff may recover, but the damages must be diminished in proportion to the amount of default attributable to deceased."

10th. In charging, "That if the jury shall believe that collision was caused by the negligence of the defendant, that at the time of the collision, the deceased was standing on the platform of the cars, and did not have notice of approaching train, then the damages must be diminished in proportion to the default attributable to the deceased."

11th. In charging the jury, "That if the deceased, at time of the collision, was standing on the platform, and had notice of the approaching train, and of the danger of a collision, and refused or neglected to abandon his exposed position when he could have done so, then the plaintiff can recover, and the jury, under their oaths, must return a verdict for the defendant."

12th. Because the verdict is contrary to the evidence.

13th. Because the verdict is contrary to the law, the weight of, and against, the evidence.

14th. Because the damage recovered is inadequate compensation for the injury sustained by plaintiff under the evidence submitted.

The Court refused to grant a new trial, and of this refusal both sides complained, and each here assigned as errors the said points in their respective motions for a new trial.

COBB & JACKSON, WHITTLE & GUSTIN, B. H. HILL, the Macon and Western Railroad Company, made the following points and citations of authorities: The company might reasonably require passengers to keep off the platform of the cars, and passengers were bound to do so. *Irwin v. R. Co.*, sec 2043. *Mitchell vs. W. & A. R. R.*, 30 *R.*, 25. *Pierce on Am. R. R. L.*, 248, 490. *Redfield on R. Ways*, 26, 348. If Johnson's negligence caused the death, his widow cannot recover. *Irwin's R. Code*, sec. 2

In giving the charges as stated, and refusing to charge

sted, as to the rule for estimating the damages, the
erred.

considering this question of the proper rule for assess-
images in cases of this kind, a brief reference to the
ation of the State on the subject will not be out of
: Prior to the Act of 1850, (Cobb's Digest, 476), no
ery could be had by any one for a tort of this character.
at Act, the right of action was given to the "*legal rep-
atives* of such deceased, to have and maintain an action
r against the person committing the act from which the
has resulted, one-half of the recovery to be paid to the
and children, or the husband of the deceased, if any, in
of his or her estate being insolvent." This Act was
quently amended, and by section 2920, (new Code), it
vided that, "A widow, or if no widow, a child or chil-
may recover for the homicide of the husband or parent;
f suit be brought by the widow or children, and the
r, or one of the latter dies pending the action, the same
survive, in the first case, to the children, and in the
case, to the surviving child or children."

this legislation, it appears that, at first, a right of action
given to the legal representatives of the deceased in such
, *in part* for the benefit of the deceased's estate, and *in*
for the benefit of his wife and children, if he died insol-
By the last Act, the right of action is taken away
the legal representatives, and the cause of action, *as far*
estate is concerned, is put upon a footing with all other
and does not survive to his representatives. This last
ion of the law looks alone to the widow, and if no
r, to the child or children, husband or father.

is view is sustained by the high authority of the English
r, construing the Act 9 and 10 Victoria, which is very
it in its provisions to our own law. There, the right
ion is given to the legal representative, but it is *for the*
of the family. In the case of Blake vs. Midland
ng Company, 83, English Common Law Reports, the
of the deceased was calculated at £850 a year. "The
nd Judge suggested to the jury, as a mode of estimating

the pecuniary loss, to take so much per annum of *that as a wife living with her husband, and maintained according to her station in life, might be supposed to enjoy.*" The Court found a verdict of £4,000. A new trial was granted, on the ground that the damages were excessive. The same doctrine was held by the Supreme Court of Pennsylvania, *that a widow could recover the pecuniary loss sustained by her husband, viz: "a reasonable support and maintenance for herself."* *Pennsylvania Railroad Company vs. Kelly*, 31 Pennsylv. State, 373. The same plaintiff vs. *Zebe et ux.*, Id., 373. The Court erred in saying to the jury, in his charge, "What gives me the most trouble in this case, is the question of damages," and repeating the same several times. 9 Ga. R., 130; 30 Ga. R., 241.

The Court erred in ruling out the said card of the passenger. This card should have been received as a part of the *res gestæ*.

LYON, IRWIN, B. HILL, for Mrs. Johnson, as to passenger standing on the platform, cited *Wells vs. Long Island R. R.*, 32 Barber's N. Y. R., 405; *Mitchel vs. W. and A. R.*, 30 Ga. R., 22; *Stokes vs. Salstanstall*, 13 Peters; *Paulk's adm'r vs. So. W. R. R. Co.*, 24 Ga. R., 265; *Pike vs. N. Y. and H. R. R.*, 476; *Redfield do.*, 433; *Carroll vs. N. Y. and H. R. R.*, Duer's R., 571; 9 Rich. R., 86. They reviewed the statutes and authorities cited by the company's attorney as to the rule for damages, and cited 5 Wallace R., 1; *Pierce's R. R. L.*, 258, (note 1), 261; *Penn. R. R. Co. vs. McClosky*, 23; *Penn. State R.*, 526, and *Paulk's adm'r vs. W. R. R. Co.*, 24 Ga. R., 365.

McCAY, J.

This case comes before the Court on a double bill of exceptions. The verdict was for the plaintiff. The defendant moved for a new trial, on the ground, first, of error in the Court in admitting and in excluding testimony, but mainly on the ground that the Court erred in his charge to the jury.

the measure of damages, and on the ground that the verdict of the jury was contrary to the evidence.

The plaintiff moves for a new trial on several minor grounds, but mainly on the ground that the Court erred in charging the jury, (this being a suit against a railroad company for the homicide of a passenger,) that the plaintiff could not recover if her husband, by the exercise of ordinary care, could have avoided the consequences to himself of the defendant's negligence.

1. It is true that there is a special title in the Code, sections 2978 to 2985, concerning damages by railroads, and that there are several more stringent rules provided against railroad companies, regulating their liability for damages, than are provided against individuals. We do not, however, see any reason why the general principles contained in sections 2917 to 2921, should not apply to physical injuries by railroads. Indeed, it is from section 2920 that the plaintiff in this case gets her right to recover at all. The rule, section 2921, "If the plaintiff, by ordinary care, could have avoided the injury to himself, caused by the defendant's negligence, he cannot recover at all," applies, in our opinion, in all cases, and it is a wise and just rule.

The man who neglects ordinary care to *avoid* an injury, has no just right to seek redress, if that injury is produced by the negligence of another, and we see nothing in the character of a railroad company which should subject it to damages for an injury caused by the neglect of its agents, where a person injured might, by the exercise of ordinary care, have *avoided* the consequences to himself. It is objected that this is a harsh rule, and it is even contended, that, though in the Code, it is not law, because beyond the power of the compilers, who were not authorized to *make* law. It is sufficient for this, to say, that both the Constitutions of 1865 and 1868 adopt the Code, and it is not worth while to discuss the extent of the powers of the compilers. Nor is this rule less binding upon the defendant than was the common law. Mr. Justice, *American Railroad Law*, 272, announces it as a general principle of the common law, "That the rule resulting

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from all the authorities is, that a party suffering injury by a collision, cannot recover if he was himself chargeable with a want of ordinary care, and thereby contributed to the injury. And in *Laing vs. Colder*, 8th Barr, it was decided, "That the company is not chargeable for an injury to a passenger which would not have occurred but for his own negligence, or to which his own negligence substantially contributed, notwithstanding the company itself is chargeable with a breach of duty."

Our own Courts, previously to the Code, had substantially adopted the same rule, and in 19 *Ga. R.*, 440, this Court, in effect, announces the rule as it exists in this section of the Code.

Our Code, sec. 2970, requires a railroad company to prove, affirmatively, diligence on its part, and declares that the presumption is, in all cases, against the company. It also provides, sec. 2980, that "if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury, in proportion to the amount of default attributable to each of the parties."

The common law rule was, that however negligent the defendant may have been, yet, if the negligence of the plaintiff contributed to the injury of the plaintiff, he was without remedy. *Sedgwick on Damages*, 468.

There could be at common law no apportionment of damages. See cases cited, *Pierce on Am. R. R. Law*, 272-275; *Angel on Carriers*, 642. A wrong-doer himself, who has contributed to an injury sustained, can not ask for redress. 8 *Man.*, and *Gran & Scott*, 114.

2. Our Code, however, in the case of railroads, adopts a different rule, and provides, in certain cases, for an apportionment of the damages according to the fault of both parties. This, as is said by Judge Benning, in 26 *Ga.*, 250, was the English Admiralty rule, and, taken in connection with the rule in sec. 2921 of the Code, is wise and just. As a matter of course, these rules are to be taken together. Mere want of ordinary care, on the part of the plaintiff, will not relieve the defendant, unless he be totally free from fault. Taken

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er, as we understand the two sections, sec. 2921 and 2920, the rule in Georgia is this: "If the plaintiff, by exercise of ordinary care, could have *avoided* the consequences to himself of the defendant's negligence, he can recover at all. But in other cases, (that is, in cases where, by ordinary care, he could *not* have avoided the consequences of defendant's negligence,) the circumstance that the plaintiff may have, in some way, contributed to the injury sustained, shall not entirely relieve the defendant, but the damages shall be apportioned according to the amount of fault attributable to each. And it seems to us, that the rule thus happily settles a subject upon which there has been some conflict of opinion, and no little display of learned argument.

We have not been able to agree with the Court below as to the rule to be adopted for estimating the damages which the wife has suffered by the homicide of the husband. This is a new question not only in Georgia, but wherever the common law is in force. The right to sue at all, depends upon the statute, and the rights of the parties must turn upon its terms. Our first Act gave the right to sue to the administrator, and enacted that, if the estate was insolvent, if the recovery should be paid by him to the wife and children. Act 23d February, 1850. The Act of 1856, amended the right to vest in the wife, if any; if not, in the children, and if none, in the legal representatives.

Under these Acts, we are inclined to think it was the intention of the Legislature to give a remedy for the full value of the deceased's life. But the Code drops the legal representatives altogether, and gives the right only in case of the homicide of a *husband or parent*, and only to the widow, if none, to the children. Code, sec. 2920. This change in the law is significant. Why is no remedy given, except in case of the death of a husband or parent, and why are the legal representatives dropped? Simply, as it seems to us, because the law was intended only to give to the wife damages for *her* loss, if no wife, then to the children, for *their* loss. What, then, is the loss of the wife? Her legal loss? It is that

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which she was, by law, entitled to from her husband, a reasonable support, according to his condition in life. We are aware that this is but a poor compensation for the loss of a loved one. But would any pecuniary rule meet the actual damages? We trow not, and we do not suppose anything was intended, by the Legislature, but to supply the loss to the wife of her actual legal rights, by the death of her husband. Anything more than this, would set us adrift, without chart or compass. The real value of a life, is incalculable, and its actual money-value is all that can be estimated. But neither the wife nor the children have any legal right in the earnings of the husband or parent, except for a reasonable support, according to his condition in life. He may, it is true, give them more, or, if he dies without disposing of his estate, they will inherit it. But they have, in law, no pecuniary interest, no legal right in his property, except, as we have said, for a reasonable support, according to his condition in life. This, they have a right to demand, and this, in our judgment, will, upon the whole, best satisfy the peculiar language of the Code, and the history of the legislation in this State on this subject. In estimating the damages, therefore, in a case where the wife is suing for the homicide of her husband, who was without fault, the jury are to inquire what would be a reasonable support for the wife, according to the circumstances in life of the husband as they existed at his death, and as they may be reasonably supposed to exist in the future, in view of his character, habits occupation, and prospects in life, and when the annual money-value of that support has been found, to give, as damages, its present worth, according to the expectation of life of the deceased, as ascertained by the mortuary tables of established reputation. This rule, as we believe, will approach nearly to a means of measuring the actual legal money-value of the life to the wife, though we do not pretend that it will, at all, compensate her for the loss of her husband—that, money, to any amount, cannot do, and it is vain to attempt it.

We have said nothing as to the children, and are free to

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of this kind, has given us damages, ought they to be upon the subject. If *her name*, and she children have no thus convey it to a *asure*. Why should any a suit by the wife? On the *ow*, the children may sue, and *ion*, the *same* shall survive to the 1920. And it is also true that, by the *nd*, an additional moral, if not legal, *or* the support, at least, of minor children of the Court, at the head of this nothing about the child or children, *t* by the wife, *her* loss is the only mat- The statute is very meagre in its *pro*- provide full remedies, and we do not *id* it beyond its terms. We hope the the law, upon this subject, more *pre*-tain as children? Does it mean minor children? In a matter of such *impor*- be clear, and as the right here given, *ion* of the Legislature, we hope it may *ined* by that body. On principles of *d* children stand on the same footing; *tion* is given only to the widow, the *r* sole benefit. We do not feel, there- the children, or the damage to them, *ie* widow, is matter for consideration. *ailroad* man, who has made the *man*- *ies*, etc., his business for years, is as *ne* skilled in any other art, and his *he* same footing. We think, however, *y* Mr. Adams, of the meaning which *s* with which he had been connected that "passengers must not stand on *t* proper evidence. The words stand

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for themselves. Suppose he had undertaken to explain stating that they meant something more, instead of something less than their plain import. Ought that, too, to be evidence? The facts of this case show that the platform is not a safe place, even when the car is not in motion. The old rule is the safe one. Let the words speak for themselves. If the door is opened at all, there is no limit to the evidence. *Greenleaf Ev.*, sec 280.

5. The precise position of Mr. Johnson, at the moment of the collision, is not positively known. He was found on the ground; he had been on the platform very short time before. The witnesses stated the facts, where they saw him and where he was found. It is sometimes very difficult to draw the line between what is evidence, as a fact, and what is a conclusion of the witness. Much of what we state as fact, is, in truth, only the conclusion of our minds from the evidence. The statement that a man remained an hour in a room, may safely be made by one who saw him go in and come out, and who, having good opportunity, failed to see him come out in the mean time, and yet all it may be, and is, a mere conclusion. We think that the *opinion* of the witness is not evidence. If the witness states the presence of the deceased on the platform, at the moment of the collision, *as a fact*, and it afterwards appears that it is only his conclusion, from his presence there immediately before and his position afterwards, we think his evidence ought not be excluded. His statement of the *fact* is verified, it is true, but it is often very difficult to draw the line when, in such a matter, fact ends and opinion begins. We do not think there is any danger that the jury should be misled. If his statement is only given as opinion, it is inadmissible.

6. The card was, without doubt, inadmissible. All parties to it were competent witnesses. It might be perhaps, to contradict or qualify the evidence of any witness who signed it, if proper foundation was laid, as in other statements, but not as original evidence. We know no rule that justifies its admission. It is not even the

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ent of one of the parties to the issue. As a part of the *gestæ*, it must have been *during* the occurrence, or so early coincident as to be free from all suspicion of afterthought. Code, sec. 3720. This was next day, and after much dispute and crimination, and, as the other evidence was, *against* the *first* impressions of the passengers.

The liability of a common carrier, for injury to a passenger, is somewhat different from his liability for goods. In the latter he stores away at his own discretion, the former is a sentient being, and has certain duties of his own to perform. The company may make reasonable rules to regulate the conduct of its passengers, and it is the duty of passengers to comply with those rules. Code, 2043. More especially is this true, when the rule is for the passenger's own safety. The platform, as is plain to the meanest capacity, is not made to stand upon. The company provides seats, and a shelter for its passengers, and the platform is, as to them, but the way to their proper place; and it is a reasonable and proper rule, which the company may prescribe, that passengers should not stand upon the platform. It is a rule for the railroad's own convenience; passengers are in the way, a hindrance to the proper management of the train, in that position. It is also true, that it is a place of danger. Whilst the cars are running it is emphatically so, but even when the cars are not in motion, it is an unsafe place.

The evidence of the notice was very strong; sufficient to cast the *onus* of want of knowledge on the plaintiff. Indeed, at this day, considering the familiarity of all classes with railroads, and the evidence which the very nature of the case offers, it would seem that, *prima facie*, every person ought to know that the platform is not a passenger's place, but a place to pass over. Suppose one were to stand on the steps, to mount the railing, or get on the top of the car, would the presumption be against him?

We cannot but think that the jury in this case have not given due consideration to the negligence of the deceased. The evidence is conclusive that he was on the platform, and that his position was, in fact, the occasion of his death. There

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is evidence, too, that he was warned *by one of the company's employees* of the impending danger, in time to have avoided the consequences ; others did avoid it, under the same warning. We are not disposed, however, to hold a man, under such circumstances, to the same coolness and wisdom of action as after the event, and as calm spectators, we may think we would have made use of. Something, perhaps much, must be allowed for alarm and confusion and temperament. We do not, therefore, hold that, under the evidence, it is clear he could have avoided, by ordinary care, the consequences of the defendant's negligence. We do think, however, that though the company was at fault, the deceased was also very careless, nay reckless. He had no business on the platform, it was a place of danger, and always is. It was known to him that a train was coming. He was warned by several of the danger, and ordered by one of the company's employees to get off, as danger was imminent.

9. After the warning, and after he heard the coming train, a passenger went into the car, got his valise, came out, again warned the deceased, got off the train, went to the side of the track, saw the coming train, and again, in a loud voice, gave warning ; and yet, deceased, foolishly or recklessly, stood his ground. It is, too, a significant fact, that he had been drinking, and was on the platform, with his hat off. We think both parties were at fault, and, under sec. 2980 of the Code, the damages ought to be diminished by the jury, in proportion to the fault of each. We do not think the jury has done this. We would not measure their verdict with accuracy. The jury are the judges of the facts, and it is only when they are so wide of the mark as to indicate passion, mistake, or some error, based upon misunderstanding of law, that a court ought to interfere. We think, in this case, under the evidence, as it is before us in the record, the jury have either mistaken the law, or have acted under the influence of passion, natural, perhaps, in view of the parties, but still, illegal. In view of all the facts, and of the law, as we understand it, we think the verdict is wrong, and the damages, under the evidence, excessive.

Judgment reversed.

Roe, *cas. ejec.*, etc., *vs.* Doe, *ex dem.*, etc.

; *cas. ejec.*, and JOHN POLLARD, tenant, plaintiff in error, *vs.* DOE, *ex dem.*, of E. B. TAIT, ex'r, etc., defendant in error.

an adverse possession of real estate, under written evidence of title, from the 5th of November, 1856, until the 24th of September, 1867, gives a good title against all persons not under disability to sue.

Since the 1st of January, 1863, the time when the Code went into operation, there has not been any statute of limitations in this State, as to suits for real property. An actual adverse possession, under written evidence of title, for seven years, gives a good prescriptive right, as against all persons not under disability to sue.

The Ordinance of the Convention of 1865, declaratory of the suspension of the statutes of limitations since the 19th of January, 1861, and directing that they should continue suspended until civil government could be fully restored, inasmuch as it creates *no disability* to sue, does not operate so as to prevent the ripening of a prescriptive title under the Code, so far as that title is dependent on a possession since the 1st of January, 1863.

A party setting up a prescriptive right under the Code, may tack to his possession, since the 1st of January, 1863, a possession, good before that time, as part of a defense under the statute of limitations, if his possession has been continuous.

When a new lessor of the plaintiff is introduced, by way of amendment to an action of ejectment, the case, as to that demise, is to be read as though the action had not been commenced until the date of amendment.

Ejectment. Statute of Limitations. Prescription. Decided by Judge WORRILL. Chattahoochee Superior Court. December Term, 1868.

In 1860, ejectment was brought by John Doe, upon the title of Rolly Hopper against Richard Roe, casual ejector, John Pollard, tenant in possession. On the 24th of September, 1867, the declaration was amended by laying a demise in the name of Edmond B. Tait, as executor of last will and testament of Rolly Hopper, deceased. The issue was the statute of limitations. The plaintiff's attorney read, in evidence, the plat and grant of the premises in dispute, from the State of Georgia to Rolly Hopper, the 24th of December, 1836, and the letters testamentary of said Tait as such executor, dated in 1857. He then

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examined, as a witness, the tenant, who stated that he had been in possession of said premises ever since the 5th of November, 1856; that he bought the lot from one Seymour R Bonner, paying him therefor \$150 00, in good current bank bills; that he made the purchase in good faith, believing Bonner had a good title, immediately took possession, and had held peaceable and quiet possession, in good faith, ever since; had cleared part of the land, built a house, etc. (There was some testimony as to mesne profits, etc., but the same is unnecessary here).

The plaintiff closed. The defendant's attorney read, in evidence, a deed from said Bonner to said Pollard, dated the 5th of November, 1856, and closed.

The Court charged the jury that the statutory bar had not attached, for as much as the Convention of 1865, on the 31st of October, 1865, passed an Ordinance enacting that the statute of limitations, in all civil and criminal cases, was and had been, suspended, from the nineteenth day of January, 1861, and that, although the Legislature did not stop the running of the statute of limitations until the 14th of December, 1861, still it was competent for the Convention to declare said statute suspended from said 19th of January, 1861.

The jury found for the plaintiff. Defendant's attorneys say said charge was erroneous.

WILLIAMS & THORNTON, M. H. BLANFORD, (represented by Judge Rich. H. CLARK,) for plaintiff in error, said: There can be no recovery by a dead man. 24 *Ga. R.*, 494; 29 *Ga. R.*, 45. A new demise is a new action. 30 *Ga. R.*, 873. The war ended when hostilities ended. *Armstrong vs. Jones*, 34 *Ga. R.*, 312. The suspension was not till 14th December, 1851. The recital to the contrary, by the Ordinance of 1865, does not bind the courts. As to retroactive statutes, they cited: 1st. Kent's Com. 455-6, and note. Constitution of 1868, art. 2, sec. 5. *Dougherty vs. Bethune*, 7 *Ga. R.*, 90-92; *Searcy vs. Stubbs*, 12 *Ga. R.*, 439, and

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cases cited, particularly 4 Wheat. R., 200 and 207; 12 Wheat. R., 378.

PEABODY & BRANNON for defendant in error.

McCAY, J.

This was action originally brought in 1860, in the name of John Doe, *ex dem.*, Rolly Hopper vs. Richard Roe and John Pollard, tenant-in-possession. On the trial, plaintiff introduced letters testamentary to one Edmund B. Tait, on the estate of Rolly Hopper, dated in 1857. As this showed Rolly Hopper to have been dead at the commencement of the suit, the plaintiff, on the trial, 24th September, 1867, added a new demise, in the name of Tait, executor.

Defendant proved possession ever since the 5th of November, 1857, under a written deed from one Bonner, and relied upon his statutory title. The grant was to Rolly Hopper. The Court charged the jury that the several Acts, (1860–1865), suspending the statute of limitations, prevented the attaching of the statutory bar, and there was a verdict for the plaintiff. There was no question made in the case, as to whether Rolly Hopper was or was not dead at the time of defendant's taking possession. By the facts in this record, it appears that the defendant went into the possession of the premises in dispute, on the 5th of November, 1856, and has continued in possession ever since. It further appears that he claimed the land in his own right, and under "written evidence of title." Clearly, his title is good, unless, by reason of the various Acts, suspending the statute of limitations, he is prevented from taking advantage of his adverse possession, under written evidence of title, for seven years. We have decided, at this term, that the statutes of limitations were suspended during the war, and up to the restoration of civil government, by various Acts on the subject. We do not think, however, that this suspension can operate in this case, to defeat the defendant.

2. By the Code of Georgia, which went into operation on

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the 1st of January, 1863, the whole *theory* of the *law*, upon the effect of a statutory possession, is altered. There is, in the Code, no statute of limitations, fixing a period *within* which actions shall be brought for the recovery of real or personal property.

The object of such statutes, to-wit: the protection of a *bona fide* possession, under claim of right, is attained by providing that adverse possession of lands, under written evidence of title for seven years, and adverse possession of personal property for four years, *shall give a title by prescription*. Secs. 2641, 2643.

Section 2644 provides that “No prescription works against the rights of a minor during infancy, of a married woman during coverture, etc., and section 2645, has a general provision, that a prescription commenced, shall cease against persons under *disability*, pending the *disability*. By other sections of the Code, under this same title of prescription there is a careful accommodation of this new doctrine to various exigencies of society, so as to prevent injustice.

It is, however, perfectly apparent that it was the intent of the compilers of the Code to drop altogether the statute of limitations of suits for the recovery of real or personal property.

It follows, therefore, that since the 1st of January, 1863, there has existed, in Georgia, no statute of limitations as to suits for realty. The Acts suspending “The Statute of Limitations” do not apply to actions of ejectment after the 1st of January, 1863, since, after that date, we had no statutes applying to such actions.

3. So far, therefore, as the rights of this defendant depend upon a possession since the 1st of January, 1863, the suspensions of the statute of limitations do not affect him, as they create no disability to sue, and, as we understand the Code upon this subject, the whole period, from the 1st of January, 1863, till the bringing of this suit, is to be counted in favor of the defendant.

4. We are of opinion, also, that the defendant may rest upon his possession, since the 1st of January, 1863, any previous possession, which would have been a good defense under the old statute.

the statute of limitations. It certainly was not the intent of the Legislature, by this charge, in the theory of the law, to deprive a party in possession of any right he had already acquired. The possession, in this case, had begun in November, 1857, and at the suspension of the statutes, on the 14th of December, 1861, he had an adverse possession of over four years.

From the 14th of December, 1861, to the 1st of January, 1863, the statutes were suspended. But after the 1st of January, 1863, there was, as to realty, no statute of limitations. The law of prescription then went into operation, and has continued since. Looking to the object of such laws, we cannot suppose that the Legislature could have intended that possessions which had been running and ripening into title before the 1st of January, 1863, should be lost, and we, therefore, conclude that persons in possession adversely under written evidence of title, on the 1st of January, 1863, started under the new law, with whatever of right they had already acquired under the statute of limitations. And they may tack to their possession, since the 1st of January, 1863, any possession previously to that time, which might have been counted under the plea of the statute.

5. Under our liberal laws upon the subject of amendments, we see no objection to the introduction, at any time before trial, of a new lessor of the plaintiff in an action of ejectment. But, as to him, it makes essentially a new suit. It may be that he has no connection, at all, with the previous parties; at any rate, this Court, in the case of *Roe et al. vs. Doe et al.*, 30 Ga. R., 873, has decided that the titles of the several lessors are different causes of action, and, for purposes of defense, the action, as to each one of them, is to be considered as commenced when that one is introduced into the declaration. This amendment was made September, 1867, and, therefore, up to that time, the defendant, as to that lessor, was in adverse possession.

We think, for these reasons, the Court below was in error, and that a new trial ought to be had.

Pearce *et al.*, vs. Bruce & Co.

JOSEPH J. PEARCE *et al.*, plaintiffs in error, vs. E. M. BRUCE & Co. defendants in error.

1. When A, a warehouseman, files a bill against B and C, partners, also warehousemen, alleging that they, as factors for D, had, in conjunction with D, illegally got possession of certain cotton which had been stored with A by various persons, and had removed it out of this State, to be sold on D's account, and prayed that B and C be enjoined from paying the proceeds to A, and that they be decreed to account to A for the value of the cotton :

Held, That this is a bill for account, and, that the true owners of the cotton (A's principals) ought to be parties to the bill.

2. In equity, all parties at interest must be made parties to a bill, if they be within the jurisdiction, and when a bill is filed against two partners, who are both served, and answer, (the bill praying an account for partnership acts,) and one of the partners dies :

Held, That his personal representatives must be made parties to the bill, unless it affirmatively appears that he died non-resident, and that the estate has no interests in this State.

3. When a bill was filed against a partnership, and after both have answered, one of the firm dies, it is not error to permit, before parties are made, an amendment, correcting a misnomer as to the Christian name of the deceased partner.

4. When a suggestion is, in fact, made of the death of a party, and entered on the Judge's docket, it is not error, even after judgment, to allow the entry to be made on the minutes, *nunc pro tunc*.

5. It is the duty of the Clerk to transcribe on the minutes, each day, all the entries on the Judge's docket showing action in a cause, when that action does not otherwise appear on the minutes.

Equity. New trial granted. By Judge GIBSON. Richmond Superior Court. January Term, 1868.

The bill of Joseph J. Pearce against E. M. Bruce & Co. and James Pearce, contained the following, in substance: In February, 1865, complainant was a warehouse and commission merchant in Augusta, Ga., and had stored in his warehouse a large quantity of cotton, belonging to diverse persons, to whom he had given his warehouse receipts for the same. On the tenth day of that month, the military authorities, under the pretense of public necessity, without complainant's consent, took all of the cotton from the warehouse, and about six hundred bales of it were left on the

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bank of the river. During said month there was a freshet in the river; five hundred and thirty bales of said cotton were rescued and removed from the river bank to the warehouse of Flemming & Wheless, in said city. The military authority assisted in this removal. Afterwards, James Pearce (and others unknown) fraudulently, etc., procured the following order from C. H. Grosvenor, Brevet Brig. General and Provost Marshal General, of the United States, in said city:

HEADQUARTERS DEPARTMENT OF GEORGIA, }
 OFFICE OF THE PROVOST MARSHAL GENERAL, }
 AUGUSTA, GA., August 25, 1865.

Messrs. Flemming & Wheless, warehousemen: You will forthwith deliver to James Pearce one hundred and thirty (130) bales of cotton, more or less, stored in your warehouse by Wm. A. Matthews, said Pearce paying your warehouse charges for storage.

By command of Major General STEADMAN.

C. H. GROSVENOR,
 Brevet Brig. Gen. and P. M. G.

(In pencil across the face) "Shipping mark W. E."

This Wm. A. Matthews was a negro, and, when said cotton was taken to the warehouse of Flemming & Wheless, was a slave, in their employment, and had no right, title or interest, in the cotton. Afterwards, on the 28th of August, 1865, said James Pearce procured another order from Grosvenor, the caption and signature of which is as above, the body of which was in these words:

"You will deliver the cotton to Mr. Pearce as directed, it appearing that it is not 'Confederate or abandoned.' The military will sustain you."

Armed with these orders, James Pearce and his confederates arranged with Elisha M. Bruce and Thos. L. Morgan, factors, commission merchants, and cotton agents of said city, under the firm name and style of E. M. Bruce & Co., for the delivery and shipment of said cotton. E. M. Bruce & Co., under and by force of said orders, received from Flemming & Wheless one hundred and fifteen bales of said cotton, the marks of which had become illegible or obliterated by

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long storage and exposure to the weather,) worth \$25,000 00, shipped the same out of this State, and sold it on account of James Pearce and his confederates. Said Bruce and said Morgan knew, when they got the cotton and shipped it, that it was not "Confederate or abandoned" cotton; that said James Pearce had no legal or equitable title thereto, that said Matthews was a negro, and his pretended claim invalid, and that said orders were illegal, unjust, and oppressive. Subsequently, E. M. Bruce & Co. advanced \$8,000 00, or other sum, on said cotton, to said James Pearce and Grosvenor and their confederates.

The complainant having such special property in said cotton, and fearing that he might be held accountable therefor to those holding his receipts, and having no other adequate redress, prayed that E. M. Bruce & Co. should be enjoined from making any further advances on said cotton, or selling the same, or paying over the proceeds thereof to said James Pearce, or his associates, and that they and James Pearce, and their confederates, should account for damages, and for the value of said cotton, to the complainant, etc.

The injunction was granted by Judge Hook. Bruce & Morgan were served; as to James Pearce, there was a return of *non est*. Bruce & Morgan filed their joint answer, in substance stating that they knew nothing about the facts stated, except that James Pearce, about the first of September, 1865, employed them to ship one hundred and twelve bales of cotton, as his property, on account of James Pearce & Co., to Watts, Crane & Co., of New York; that he delivered to their shipping clerk orders on Flemming & Wheeler for the cotton, and procured the permission of the military for its shipment; (military permission for such purpose being then absolutely necessary); that they advanced to James Pearce about \$10,000 00, but never advanced anything to any one else; that they had made advances of \$2,500 00 for expenses of shipping said cotton, and that the only interest they had, or ever had had, in the cotton, was their claim on the same for such advances and expenses. They said they believed that the cotton had been shipped from New

York to Liverpool, and perhaps it was sold. They denied all fraud and combination, or knowledge of any thing of the kind. When this answer was filed, did not appear, but it was sworn to in April, 1866. In January, 1868, Morgan filed an amendment to his answer, averring that, if the alleged *tort* was true, it was the act of Bruce only, without direct or indirect co-operation by him; that since said answer was filed, Bruce had died, and "his death had been suggested to this Court;" that no representative of Bruce had been made a party, and that the complainant could not proceed without such representative was made a party. The Court decided that the cause could proceed against the survivors. At the same time, he further amended, by answering that E. M. Bruce & Co. was composed of himself and Eli M. Bruce, and Elisha M. Bruce was the party sued and served; that he did not know this when the answer was filed, and now plead that his partner, Eli M. Bruce, was never served.

When complainants' solicitors were notified of this, they moved to amend the record by substituting Eli for Elisha, in the name of Bruce, wherever it occurred. The Court allowed this amendment over the objection of the defendants' solicitors. The case was tried, and resulted in a verdict for the complainant for \$19,444 34, with interest from 28th August, 1865. What the charge of the Court was does not appear, except as stated in the motion for a new trial. The defendants moved for a new trial, on the grounds that the Court erred,

1st. In holding that the cause could proceed without Bruce's representative being a party.

2d. In holding that the owners of the cotton were not necessary parties to the bill.

3d. In charging the jury, "If a party assert the right of another over property, after notice from the owner, it will be evidence of conversion."

4th, 5th, 6th. Because the verdict was against the law and evidence, for reasons therein stated.

7th. Because the verdict was contrary to the evidence. Because, if any such *tort* or wrong, as that charged by the bill,

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was committed by Bruce, it was before Morgan was his partner, and, therefore, no recovery could be had against Morgan.

8th. For the same reason, there could be no recovery against Morgan, as surviving partner.

9th and 10th. Even if he were a partner, the evidence did not connect him with the *tort*, and, therefore, the verdict was wrong.

11th. Because of certain newly discovered evidence set out in the record.

This motion was amended by adding other grounds for a new trial, as follows:

1st. It was necessary that James Pearce should be served, in order to do complete justice.

2d. Because no allowance was made by the jury for said advances and expenses.

3d. Because complainant, having renounced all claim on the cotton, he could not recover.

4th. Because no damage to complainant was shown by the evidence.

5th. Because Bruce's death was not suggested upon the record, and no proceeding, in said case, could be had until such suggestion was made.

It appeared that Bruce's death had been suggested on the Judge's docket, but not on the minutes. Complainants' solicitors asked to put it upon the minutes, *nunc pro tunc*, which the Court then allowed, over the objection of defendants' solicitors.

The Court granted a new trial upon the 7th, 8th, 9th, and 10th grounds, overruling the other grounds.

Complainants' solicitors brought the cause up for review, assigning for error 1st, 2d, 3d, 4th, and 5th, that the Court erred in granting the new trial, for any of the reasons stated in said 7th, 8th, 9th, and 10th grounds of the motion.

6th. In not putting the grant of the new trial upon condition, that complainants abate or write off, from said verdict, the part not sustained by sufficient evidence.

7th. In granting a new trial, as to the whole case, and not

fining it to the question of said advances, diminishing the
very.

th. In holding that these advances, or any part of them,
ht to be allowed to said survivor.

th. In holding that it was not sufficiently shewn that
rgan & Bruce were partners prior to 1st of September,
5, and that, therefore, Morgan was not liable.

And in the same bill of exceptions, the defendant's solicit-
brought up, for review, the decision as to said 1st, 2d,
4th, 5th, 6th, and 11th grounds, for new trial, and 1st,
4th, and 5th grounds in the amended motion for new
d, and upon the ground that the Court erred in allowing
uce's death suggested on the minutes of the Court at the
re it was done.

WALTON, SHEWMAKE, for plaintiffs in error.

JOHNSON & MONTGOMERY for defendants in error.

McCAY, J.

If this were an action at law, by the plaintiff, founded
on his special property in the cotton, the subject of dis-
te, the authorities are abundant that he might sue alone.
bailee of goods, on store, may sue a stranger who inter-
res with them, for the wrong to his possession.

1. But this is a bill in equity, charging that the defendants
d got possession of the cotton, sent it out of the State
sale, and were about to pay the proceeds, when finally
ld, to James Pearce, and it prayed an injunction against
disposal of the proceeds, and that the defendants *should*
beant with the plaintiffs for the proceeds.

2. This is altogether a different thing from a proceeding at
e, based upon the special property of the plaintiff. It is a
plar proceeding in equity for an account and settlement
from the parties in relation to the subject matter of the dis-
te. And it is well settled, that, in equity, in such cases, all
the in interest must be before the Court. Equity will not
beant by halves. *It will grasp the whole case, and settle*

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it. The true owners of the cotton are directly interested in this *account*, and must be made parties, or some good reason must be shewn why this cannot be done. The special interest of the complainant, and his liability to the true owners on his receipts, gives him sufficient interest to be a party, and the bill may be amended so as to include the others.

We may remark, that equity would have no jurisdiction of this transaction at all on the *tort* alone. It is only because an account is prayed that Chancery will interfere, and parties must, therefore, be such as have a right to pray for an account. The *tort*, as such, has nothing to do with it. The case proceeds on the ground that the defendants have the complainants' property, and must account for it. The bill was filed during the life-time of Bruce. He and his partner, Morgan, were both served, and both answered. We do not think the simple death of Bruce authorized the proceeding to go on against the survivor. Were this an action at law, this would, without doubt, be the proper course. The survivor, on the death of a partner, is, at law, the only person to sue or to be sued. But in equity this rule is modified by the settled principle, that all parties in interest must be before the Court. The death of a partner dissolves the partnership, and as to all choses in action, the legal title and right to sue is in the survivor; but, with certain qualifications, the personal representatives of the deceased become tenants-in-common with the survivor of all the partnership property and effects in possession. Story on Partners, sec. 346. The estate of Bruce is directly interested in the result of this decree. It is a tenant-in-common with Morgan in the effects, out of which it must be paid, and unless there be some good reason shown, as that there are no effects, we do not see how the case can go on without a representative of Bruce. Story's Equity Pleading, sec. 167. Now we think section 3396 of the Code is against this view. That section does not mention the case of partners, and it provides that the plaintiff may proceed against the survivor to the extent of his liability. But here is a proceeding, not against Morgan, but, in its necessary effect, against the estate of Bruce.

of the firm, in which, as we have said, the estate of Bruce has a common interest with Morgan. If it should be shown that Bruce's representatives have no interest in these effects, as by an allegation that there are no firm assets, or that they are wholly insufficient to pay the debts of the concern, that might furnish an excuse for not making the representative a party. But as the case appears in this record, we think the Court right in granting a new trial on this ground.

Nor do we see any error in allowing the correction of the mistake in the name of E. M. Bruce. These were parties to the cause in Court, and this was a mere error in description, which, we think, might be corrected on motion at any time,

4. The permission to enter on the minutes the order suggesting the death of Bruce, was not error. The death had been suggested at the proper time, and noted by the Judge on his docket. The Clerk had failed to transfer this entry to the minutes. It was a mere misprision of the Clerk. The minutes did not show the true history of the case as the facts occurred, and it was the duty of the Court, at any stage of the proceedings, even after judgment, to make the minutes conform to the truth. The Judge's docket is a mere *memorandum* for his own convenience, and is not the record.

5. It is the duty of the Clerk to transcribe, each day, into the minutes, the continuances, suggestions, etc., showing progress or action, by the Court, in the cause where that action does not otherwise appear upon the minutes. If, in any case, the Clerk fails to do this, surely the Court may, at any time, have this misprision corrected.

Judgment affirmed.

Roberts vs. Mansfield.

JAMES T. ROBERTS, plaintiff in error, vs. JAMES MANSFIELD, defendant in error.

Where A is the owner of two promissory notes, due at different times, and of a mortgage on real estate securing them, and transfers one of the notes to B, entering, at the time, into a written contract that he, in a specified time, would transfer to B and his assigns, the mortgage to secure the note, and B transfers the note and agreement, the note still being not due to C, and A afterwards refuses to transfer to C the mortgage, except upon conditions, which C is not bound to accept:

Held, That though A still had the legal title to the mortgage, he held it for C's use, and, if by the use of that mortgage, he collects, out of the property mortgaged, money sufficient to discharge C's note, C may recover the same from A.

Equity. Transfer of mortgage. Tried before JAMES M. CLARK. Mitchell Superior Court. November Term, 1868.

On the 1st of August, 1853, three men, named Faircloth, made and delivered to James Mansfield, their two promissory notes, for \$1,000 00 each, payable to Mansfield or bearer, with interest from date, due on the 1st of January, 1855, and the 1st of January, 1856, respectively. At the same time, they delivered to him their mortgage on certain lands, to secure the payment of said notes. The mortgage was duly recorded. On the 31st of August, 1853, Mansfield transferred said mortgage to William H. Watson, without recourse on Mansfield. On the 1st of May, 1854, he also delivered the note due on the 1st of January, 1856, and a paper in the following words, to one Jno. N. Pate:

“GEORGIA, DOUGHERTY, COUNTY.

“Whereas, I have this day (sold) to Jesse Pate, a promissory note on Wm. M. Faircloth, David Faircloth and Riley Faircloth, for the sum of one thousand dollars, dated the 1st of August, 1853, and due on the first of January, 1856, payable to me, or bearer, which is secured to me by mortgage on” (here follows a description of the land) “which said mortgage I do hereby agree to have transferred to said Pate, before said note falls due, for the purpose of securing the payment of said note to said Pate, his heirs or assigns.

“Witness, my hand and seal, this 1st May, 1854.

JAMES MANSFIELD. [L. s.]”

On the 6th of January, 1855, Watson re-delivered said first mortgage, and re-conveyed said mortgage to said Mansfield. He issued the makers thereon, obtained his judgment on the 1st of December, 1855, had the mortgaged premises levied by the *fi. fa.* founded on said common law judgment, and same was sold in March, 1856, to one Cheever, at sheriff's sale for \$1135 00. The *fi. fa.* was then paid off, (the balance of the fund being paid to the defendants in *fi. fa.*)

In 1858, Roberts brought his action against Mansfield, alleging said facts, that he was the assignee of Jesse Pate, *fide*, for value, and before said second note and agreement was due, and without knowledge of the first note, or of anything to make him doubt the perfect security of said second note, that the makers were insolvent, and that said Mansfield, by selling said land, as aforesaid, and especially by giving notice at the sale, that the purchaser would get an encumbered title, had caused him to lose said demand, and bring judgment against Mansfield for the amount of said second note. Thereupon, Mansfield filed his bill, averring he transferred to John N. Pate, (who, by mistake, was called Jesse Pate in the contract,) as agent for one Treadwell, said note, and delivered to him said promise to transfer said mortgage, in consideration that Pate, as such agent, would take a note which Treadwell had against Mansfield with \$330 00, and had given him a note on Treadwell for \$330 00, 1st October, 1854, which was to be discharged by three wagons; that, at the date of the trade with Pate, he informed him of the first note being transferred to Watson, and that he had transferred the mortgage to Watson to secure said note, and that for that reason he could not then transfer it to him; that it was expressly understood that the priority of the first note was a right prior to the security of the second, and was not to be injuriously affected by the transfer to Pate, but that he was to buy back the mortgage from Watson, and hold it first for the security of the first note, and then transfer it for the security of the other.

It was stated that Treadwell did not give him said credit of \$330 00, but sold his note before it was due, and he had

been compelled to pay it; that, honestly intending to carry out his contract, on the 17th of December, 1855, having, at great expense, gotten back the mortgage, he offered to transfer the mortgage to Treadwell, and tendered such a transfer to R. F. Lyon, attorney-at-law for said Roberts; that he could not at law set up this defense against Roberts, nor then prove anything inconsistent with the writing aforesaid, and yet he ought to be paid said \$125 00 and said \$330 00 notes with the interest on each, and he prayed injunction against Roberts's said action till said writing was reformed, so as to carry out the real agreement, etc., and that Treadwell and Roberts should answer touching said premises. The injunction was granted, and the bill was served on Roberts and Treadwell. Treadwell answered, admitting that Pate took the note and transfer, as his agent, and gave a note on him for \$330 00, as the difference between the wagons, etc., sold and the Faircloth note, but he never heard from Pate anything else as to said trade, nor knew anything else about it except as to said \$330 00 note, and what appeared in the said written transfer; that he did sell Mansfield's note without having put any credit on it, but knew not that any was to have been put on it till Pate told him so, long after he had sold it, and it had been sued on; he said that Pate was insolvent and gone; he himself was insolvent now, but would have paid said \$330 00 note, had it been presented when he was good; that he has no interest directly or indirectly in the Roberts action; that in a few days after Pate had delivered them to him, he sold to Roberts said note and transfer for full value, in a due course of trade, and without knowledge or suspicion by either that there was any defense to the paper.

ROBERTS answered, saying he knew naught of the matter aforesaid, except that before said note was due, and with the full belief that it was good, he gave Treadwell a negro woman, worth \$650 00, and the balance in cash, for said note and agreement. The parties went to trial on this common law action and the bill in equity together. Plaintiff read, in evidence, the note and writing which were taken by

Pate, the original mortgage and said transfer of 31st August, 1853, and retransfer of 6th January, 1855, and said first note attached to the mortgage. There was on the mortgage, also, a transfer, as follows :

"For value received, I do hereby transfer and assign the within mortgage deed unto H. Treadwell, for the purpose of securing the last promissory note therein specified. I retain my right to hold said mortgage to secure the payment of the first note therein described, which said transfer is made without any recourse or liability on myself, my heirs and assigns, this 17th December, 1855.

JAMES MANSFIELD. [L. s.]

This last transfer plaintiff's attorneys did not read in evidence. Plaintiff also read, in evidence, said common law action, and the *fi. fa.* showing said sale and disposition of the proceeds of said land. Plaintiff's attorneys also read, in evidence, an agreed state of facts, by which it was admitted that this was the mortgaged land; that at and before said sale, R. F. Lyon stated that, as attorney of James T. Roberts, he held the agreement of Mansfield to transfer said mortgage to secure said \$1,000 00 note, before the first of January next, before the sale, and that Mansfield, on demand, had refused to make the transfer; that David A. Vason then stated, that Mansfield had agreed to transfer the mortgage, as he understood and made the contract, but that Lyon had refused to take it, because it was not in compliance with the written agreement to transfer; that this *fi. fa.* was founded upon the first note specified in the mortgage, and that he was satisfied that the purchaser, at said sale, would get a perfect title and get the land free from said mortgage. In doing this, Vason was representing said Watson and said Mansfield, (Watson having about \$700 00 in said *fi. fa.*, and the balance of it belonging to Mansfield,) and was then, also, attorney for Mansfield in this litigation; Vason bid for the land, and ran it up to the amount of the *fi. fa.*; it brought more, and the balance was paid to the defendants in *fi. fa.*, under an order of Court. Lyon did not state that he was authorized to waive his lien, but the contrary; nor did he do so, he only stated that he was employed to sue Mansfield for

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the money, for refusing to transfer the mortgage, as he had agreed. Vason may have created the impression that the title would be good to the purchaser under the sale, but to those to whom he gave his reasons, he stated that Lyon's refusal of the proffered transfer was a waiver of his client's right to control the mortgage against the land after this sale, (he meant said transfer of 17th December, 1855) that Lyon was the attorney of Treadwell, and said offer was made after, Lyon, as attorney for Roberts, had demanded the transfer to him, according to the written contract; and further, that the Faircloths were insolvent, and the only security for the note was the land.

R. F. LYON testified that he received said note and assignment of Mansfield from Roberts, for collection, and called on Mansfield for the transfer of the mortgage. Mansfield refused to make such a transfer as the writing called for, but, some time afterwards, tendered the one dated 17th December, 1855, which Lyon would not take, because it was not in conformity with the writing. Said John N. Pate, by interrogatories, showed that the trade and understanding between him and Mansfield was in substance as set out in Mansfield's bill, and further that he told Treadwell, as to the \$125 00 credit, but no note on which it was to have been placed, having been tendered off, and Treadwell having directed him to get up a new note, and make the credit, he failed to do so during the two months that he stayed with Treadwell.

MANSFIELD testified that he offered to Lyon said transfer of 17th December, 1855, on the same day of Lyon's demand, and just after the demand, which was made on that day. The defendant read in evidence said transfer.

The evidence being closed, the Court charged the jury. After stating the case, that they might understand it fully, proceeded as follows: "Whatever may have been the agreement or understanding between Mansfield and Pate, or Treadwell, differing from the written agreement, said agreement or understanding does not bind Roberts, unless notice is brought home to him. The mortgage was transferred to Roberts in due operation of law; was an incident to, and followed, the no

in the hands of the purchaser. The law having vested the right to the mortgage in Roberts, he had the legal right to foreclose the same, or otherwise assert his lien on the mortgage property. It was his duty, on the day of sale, to have given notice to purchasers of his mortgage lien; if he gave notice, then the lien continued, and followed the property in the hands of the purchaser. If he failed to give notice, when he is in *laches*, he loses his lien, and the purchaser gets clear title.

"The defendant is bound by his contract, according to its terms, and while the law transfers the mortgage lien to Roberts, yet, the defendant is bound to fulfill his contract, and, if any damage resulted to plaintiff by his failure to do so, he is liable for the damage. If the failure or refusal caused the plaintiff to lose his lien, or otherwise his debt on the Faircloth's, then the measure of damages is the note and interest. But if the failure or refusal caused no special damage, and the plaintiff was in as good condition after as before refusal, when he can not recover, unless he shows some special, actual, damage."

The verdict was for the defendant. The plaintiff in error says the whole charge is erroneous, and especially that part of it as to the transfer of the mortgage to Roberts by operation of law.

R. F. LYON for plaintiff in error.

VASON & DAVIS for defendant in error.

McCAY, J.

The error of the Court in this case, consists in the following charge to the jury: "It was his (Mansfield's) duty to give notice of his rights at the day of sale. If he did not do this, he is in *laches*, and can not recover, and then his lien continued and followed the proper effect, this was a charge that the plaintiff could not deny. Failure to give notice, puts him in *laches*; giving notice turns him off the defendant on the land.

There are two views of this case, in either of which the jury find the facts, as under the proof they find the defendant is liable to the plaintiff below.

The plaintiff ought not to be heard in denial of his declarations on the day of the sale. He was the holder of the mortgage, and, at the sale, he publicly claimed that it was still his, and that the purchaser would get a good title against it. He now proposes, in effect, to deny this; and that after he has got the benefit of the mortgage, misled, by his solemn act, the purchaser at the sale cannot be allowed thus to trifle with the rights of the plaintiff, and, by permitting him to set up this defense, the plaintiff, perhaps successfully, against the purchaser bought on his faith in his (Faircloth's) statements. See *leaf Ev.*, sec. 207, 209.

But there is another view of it. Assuming the facts as Mansfield claims, and there is evidence on which the jury might so find, Faircloth held the title to the mortgage as trustee for Mansfield. Whilst so holding it, he agreed to sell it at a sale, under a *fi. fa.* for a part of the same debt, that the purchaser at the sale will get a good title against the mortgage. In other words, he uses the mortgage for his own benefit, and, by that use, he secures a bidder to the amount of the debt.

Now, it is well settled, that when a trustee uses the property of the trust, for his own benefit, that the true owner is not compelled to follow the property, even though he may be able, by proving notice, to follow it successfully.

his option, in such a case, to sue the trustee, or follow the property.

It would be monstrous to permit the trustee, in such cases, to say: "Yes, I have used the trust property; I have got the benefit of that use, but you can prove that the party now in possession had notice of your claim. He trusted, it is true, to my statements, but he ought to have known me better. Your remedy is on him."

The rule is well established, that the *cestui que trust* may sue the trustee, even though it appear that he has a right also to sue the person dealing with the trustee. 2 Story's Equity, sec. 1262; Dacker vs. Soames, 2 Mylne & K., 655.

H. F. RUSSELL, plaintiff in error, vs. C. D. CARR & Co.,
defendants in error.

The date of a mortgage is the day of its delivery, and that day may be shown by parol, notwithstanding a different date be on the face of the deed.

Two mortgages executed on the same day are of equal date, and if both are recorded in time, are entitled to share *pro rata* in a fund not sufficient to satisfy them both.

The law will not note fractions of a day except to prevent injustice, and in cases specially provided for by law. WARNER, J., dissenting.

Priority of mortgage liens. Decided by Judge GIBSON.
Richmond Superior Court. June Term, 1868.

The house and lot of Thomas M. Johnson was sold by the sheriff for \$6,800 00. He applied \$4,111 00 to costs and a mortgage in favor of Clayton. The balance was claimed by C. D. Carr & Co., and also by Henry F. Russell, mortgagees, each of whom claimed that his lien had precedence over the other's. The sheriff having been ruled, these mortgagees were at issue on this point, and agreed that the Judge should decide both the law and the facts in the cause.

On the 24th of April, 1867, Johnson made and delivered two

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mortgages on said lot. One was to Alpheus C. Bean, to secure note for \$2,000 00, dated 16th April, 1867. It was recorded on the 7th of May, 1867, and transferred to Henry F. Russell on the next day. It noticed a previous mortgage to Clayton for \$3,500 00. The other was to Henry W. Carr, C. D. Carr & Company, dated the 16th of April, 1867, to secure a note for \$1709 07, of that date, recorded on the 26th of April, 1867, and it made no mention of any previous mortgage. The mortgages had been foreclosed at the same term of said Court and no defence had been made to either; one was described in the pleadings and mortgage *fi. fas.* as of the 16th, and the other as of the 24th of April, 1867. Russell's mortgage was delivered about noon, the other was not ready, and therefore was not delivered till about 2 o'clock, P. M. The draftsman of Russell's mortgage said to Johnson that he dated the mortgage and note to correspond with a check which Johnson had given Bean, which check he gave up when Johnson signed the note. There was some dispute as to the circumstances attending the delivery of these mortgages, Carr contending that Johnson promised that no one should have a preference over him, and Johnson asserting that he said his premises cost \$10,000 00 in gold, were sufficient to secure all, and that Carr should have the third mortgage.

The foregoing facts appeared by the papers and the oral testimony of the mortgagees, of Johnson and the draftsman of the mortgages. Carr's attorney objected to Johnson upon the ground of incompetency, and to his testimony upon the ground that it varied a written instrument, but the Court overruled this objection. The Court held that said balance should be divided between the two mortgages *pro rata*. To this decision both sides excepted and assigned errors. Russell's attorney said that, because his mortgage was delivered first, he should be paid in full, in preference to the other. Carr's attorney said the Judge erred in allowing Johnson to testify, and as to the effect of his testimony, and contended that his mortgage should have been paid to the exclusion of Russell's, because, by date, it was older than Russell's, and because, if Russell intended contesting the priority of Carr's

, he should have made himself a party to Carr's motion foreclosure, and contested it before judgment. These objections, by a cross-bill of exceptions, came up for adjudication.

W. HOPE HULL, L. E. BLECKLEY, for Russell, furnished a brief to the Reporter.

JOSEPH N. CARR, (by the Reporter,) for Carr & Company, made the following points and citations: Johnson is incompetent because of interest. *Nesbet vs. Lawson*, 1 Kelly, (*Georgia Reports*), 275; *Bailey vs. Lumpkin*, *Ibid*, 92; *Howard vs. Brown*, 3 Kelly, (*Ga. R.*) 527; *Harvey vs. Anderson*, 12 *Ga. R.*, 69; 1 Gr. on Ev., secs. 190, 397. 1 Phil. on Ev., 526, 530. Code of Georgia, secs. 3721, 3725. The statute making parties competent does not make Johnson incompetent. *Revere vs. Leonard*, 1 Mass. R., 91; *Winkler vs. Scudler*, 1 Kelly, (*Ga. R.*) 168; *Barrett vs. Troutman*, 9 *Ga. R.*, 6; *Dollner, Potter & Co., vs. Williams*, 29 *Ga. R.*, 743. His testimony was to contradict the writing, and therefore illegal. Code of Georgia, secs. 3709, 3847, 3756. Russell should have objected before judgment. Code of Georgia, secs. 3882, 3903. *Knowles vs. Lawton*, 18 *Ga. R.*, 476. 1 Gr. on Ev., 523, 536. This antedating is not such accidental mistake as equity will correct. *Adams' Eq.*, 169, *et seq.*; *Collier vs. Lanier*, 1 Kelly, (*Ga. R.*) 238. 1 Story's *Eq. Juris.*, secs. 105, 106, 108, 141, 146, 147, 149, 155, 157. *Ligon vs. Rogers*, 12 *Ga. R.*, 287. As to delivery of a deed, 1 Black. Com., 304, 312, 313, 314, 343, Bouv. L. Dic., "Date." Our Code makes the date control the lien, secs. 1946, 2663, 1944, 1943. If wrong in this, then the Judge is right. Code, sec. 1856.

MCCAY, J.

The true date of every paper is the time of its delivery, and this may, even as between the parties themselves, be shown, although a different date be upon the paper. 4 Gr. on Ev., Cowen and Hill's notes, part 2d, 588, and cases.

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cited. Much more is this true, when the real facts of a transaction are sought to be proven by one who is not a party to the paper, but who resists it. The rule that a writing cannot be altered or explained by a parol, only applies against the parties to it, or privies. A stranger, to whom it has become important to show the truth of a transaction between others, is not bound by what *they* may have agreed upon as to its truth. He has never agreed to the writing. 1 Greenleaf's Ev., sec. 277; 2 Starke's Ev., 575. So too he is not bound by the judgment of foreclosure. He was no party to it and was not heard. 1 Kelly, 412, 6 Ga. R., 178.

The real point in this case is, whether the fact that Russell's deed was delivered a couple of hours sooner than Carr's, though on the same day, gives it priority. The general rule is, that the law makes no fractions of a day. 15 Ves., 257; 9 East., 154; 4 T. R., 660. It has even been held that the service of a copy writ, before the original was filed in office, if it was filed on the day of the service, was good.

It is true that this rule, being in fact a fiction, will not be adhered to when it would work injustice. 3 Burr, 1434; Gr. E., 154.

We do not think this is such a case. These parties were both creditors of the mortgagor. Morally, they had equal claims upon him. Evidently it was not his intent to give the preference to either. It was only by a sort of accident that Russell's was first signed. The mortgagor was, in fact waiting for Carr's to be prepared when he was called out by Russell. We see, therefore, no injustice in putting them on an equality.

The man who gets a secret lien upon the property of another, who still retains the possession, has no natural right or equity against third persons. Some positive law may give him preference, or equity, which is equality, will put others who, without notice, though subsequently, also get a lien, on an equal footing with him.

The rights of mortgagees, as against each other, are regulated by statute. The common law only gave rights when the possession passed or there was notice. The register

aws and other positive legislation provide for preferences and priorities between liens when there is no transfer of possession.

Clearly, under our registry laws, either of these mortgagees would, for purposes of registry and fixing his lien, have a right to consider his mortgage as executed in the first minute or last minute of the day of its date. He had three months from its date in which to record it, and he might delay till the last minute of the last day.

We think, moreover, that section 1956 of the Code controls this case. That section provides that if there be several mortgages of *equal date*, or embraced in the same mortgage, and one forecloses, the Court will control the proceeds of the sale to *distribute* to the several mortgagees according to their claims. Code, sec. 1956.

Here are clearly two cases put, *one* of several mortgages in the same instrument, and therefore simultaneous, the other of several mortgages of *equal date* which cannot possibly be simultaneous in fact, as one must necessarily be executed before the other; yet it is provided that if one forecloses, the court will control the proceeds of the sale to *distribute* to the several mortgagees according to their claims. It is hardly conceivable that such language should have been used if it had been the intent to allow mortgages executed on the same day, to have priority as to each other, if proven to be older at a point of fact.

Nor does section 1982, providing that when liens are declared to be of the same dignity, then the oldest shall have preference, affect the question.

That section does not apply to mortgages; the priorities between them are regulated by notice and by the registry law, and though of equal dignity, it often occurs that the ~~last~~ does not have the preference.

That section 1982 evidently applies to the liens provided for in the article in the Code in which it is found. Some of these liens are declared by the Code to be of the highest dignity, and as to others nothing is said of their dignity. The liens alluded to are all liens growing out of the peculiar

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relations of the parties to each other and to the property, as attorneys and clients, steamboat owners and hands, mechanics and their workmen, landlords and tenants, factors who furnish material to make the crop, etc. In all such cases there is an actual equity in favor of the first, as he either has possession, or it may easily be found out that he has put his labor or material on the thing. Mortgages stand on a different footing; they are secret liens, and they have no natural, equitable preference over each other without notice, and their priority is therefore regulated by law.

We think section 1956 of the Code puts all of *equal date* on the same footing, unless there is some other equity to control the distribution of the proceeds.

Judgment affirmed.

BROWN, C. J., concurring, wrote out no opinion.

WARNER, J. dissenting.

The question involved in this case is, whether two mortgages, executed on the same day, though not at the same time of that day, shall share equally, or *pro rata*, in the distribution of the proceeds of the sale of the mortgaged property, or whether the mortgage *first* executed and *delivered* on the same day, has the *prior lien* upon the mortgaged property. Bean's mortgage was executed and delivered about two hours before the mortgage to Carr was executed and delivered by Johnson, the mortgagor. The 1956th section of the Code declares: "If there be several mortgages of equal date, and one forecloses, the Court will control the proceeds of the sale to distribute to the several mortgagees according to *their claims*." Here Russell, the assignee of Bean, *claims*, that his mortgage was *prior* in point of *time*, and therefore, has *priority of right* to the proceeds of the mortgaged property. In my judgment, he has such *priority of right*. The 1982d section of the Code declares: "Where different persons hold a lien on the same property, and both declared to be of the same *dignity*, then, the *oldest lien* shall have the preference." If Bean's mortgage had been exe-

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cut and delivered on the 23d of April, 1867, and Carr's mortgage had been executed and delivered on the 24th, then, it is conceded, that Bean's mortgage would have been *prior* in point of *time*. The principle is, that the *oldest lien* shall have the preference. Why should not that principle control and be applicable to the *oldest lien* created on the *same day*, as well as to liens created on *different days*? See Brown vs. Hartford Insurance Company, 3d Day's Cases, 65; Halbird vs. Burr, 17th Conn. Rep., 559, 560; Combe vs. Pitt, 3d Burrow's Rep., 1434. The Code, it is true, declares, that if the mortgages are of *equal date*, the Court will control the proceeds of the sale to distribute to the several mortgagees, not according to *the date* of their respective mortgages, but according to *their claims*, and Russell, the assignee of Bean, the mortgagee in this case, *claims*, and has, in point of fact, the *oldest lien*, and is entitled to have the preference; therefore I dissent from the judgment of the Court.

JONATHAN M. MILLER, plaintiff in error, vs. ARTEMUS GOULD, defendant in error.

THE GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, vs. F. M. EDDLEMAN, defendant in error.

When a contract was made between two citizens of the late Confederate States during the war, on the 12th July, 1862, payable three years after date, the consideration of which was Confederate Treasury notes, the only circulating currency in the country at that time, and which was recognized as *lawful* by the assumed authority which had the *actual* possession and control over the country and people at the time the contract was made:

Held, That although the issuing of such notes by the assumed Confederate authority for the purpose of carrying on a war against the Government of the United States, may have been illegal as against that Government, and the citizens thereof, who, during the war, were under the *actual* protection of that Government, *outside* of the lines of the assumed Confederate authority; yet, such a contract made between citizens residing *within* the lines of the assumed Confederate

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authority, in their ordinary business transactions between themselves, and having *no connection with the prosecution of the war against the United States*, is not an illegal consideration, as *between the contracting parties themselves*, they having made the contract under the assumed authority which was then over them, and which assumed authority, (whether rightful or otherwise, is not now the question,) *recognized the currency as legal, and valid, at the time the contract was made*; therefore, as between the *contracting parties themselves*, the plaintiff is entitled to recover:

Held also, That the contract in the record mentioned, is not such a contract made with the *intention*, and for the *purpose*, of aiding and encouraging the rebellion, as was contemplated, or is embraced within the provisions of the Constitution of this State.

BROWN, C. J., dissenting.

Assumpsit. Confederate Currency. Tried before Judge GIBSON. Richmond Superior Court. June Term, 1868.

The facts of No. 1 were these: Gould sued Miller upon the following promissory note:

\$3,000 00.

AUGUSTA, 12th July, 1862.

Three years after date, we jointly and severally promise to pay A. Gould, or order, three thousand dollars, with interest after one year, payable every six months, for value received.

JAMES FISH,
JONA. M. MILLER.

Miller plead that said note was void, because it was given for \$3,000 00 in Confederate States Treasury notes, loaned to Fisher, and "that said Confederate States, at the time of said consideration, were a league and combination of certain States of the United States of America, in rebellion against said United States, and said notes of said Confederate States were issued for the purpose of aiding and abetting said rebellion, and then and there the plaintiff had knowledge thereof."

The plaintiff's attorney demurred to said plea.

The demurrer was sustained, and the plaintiff had judgment for the principal and interest on his note. The error assigned is the order sustaining the demurrer.

J. T. SHEWMAKE, W. HOPE HULL, JOHNSON & MONTGOMERY, for plaintiffs in error, made the following points: There can be no recovery upon a contract, the consideration

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of which is illegal, whether by statute or as against public policy, citing Bk. of U. S. vs. Owens, 2 Peters, 527. Craig vs. Missouri, 4 Peters, 410. Walker vs. Johnson, 2 Cranch & C. R., 173, 203, 208. Code of Georgia, sec. 2703. 2 Wash. C. C. R., 98. 35th Geo. R., 320, 330, 364. Armstrong vs. Toler, 11 Wheaton, 208. Hunt vs. Knickerbocker, 5 John. R., 327.

The issue of Confederate Treasury notes was illegal—Law Review for January, 1868, page 304; for July, 1868, pages 604-5. The Confederate Government was not a *de facto* government—Law Review for October, 1867, page 95; and if it were, acts done against the *de jure* government would be illegal—8th Bacon's Abr., 11. The rebellion was contrary to law, etc.,—Constitution U. S., Art. III, Sec. III, and Art. I, Sec. VIII, clause 14, and the Preamble and 1st Brightly's Dig., 440. Circulating such currency was illegal, etc.,—Chitty on Con., 657. State Courts are bound by the decisions of the Federal Courts—Constitution U. S., Art. VI, clauses 2 and 3.

G. G. McWHORTER, J. GANAHL and H. W. HILLIARD, for defendants in error, replied: "The consideration is legal and valid by the *lex loci et lex temporis contractus*, because the Confederate States were then a *de facto* government—Vattel, secs. 292, 293; Proclamations and Acts of neutral foreign powers; Lincoln's Proclamations as to blockade, etc.; Acts of Congress, July, 1861, secs. 5 and 6; The Prize Cases, 2 Black U. S. S. C. R., 637, 689; The Circassia, 2 Wallace, 136; Mrs. Alexander's Cotton Case, Ib., 404, 423; Mouran vs. Insurance Co., 6th Wallace, 1015. The contract will then be enforced—Story C. of L., 244, 248, 372; Randon vs. Toby, 11th Howard, 493, and Armstrong vs. Toler, *ante*, 17th Howard, 232. Gould needs no aid from the illegal transaction, and therefore can recover—Simpson vs. Bloss, 7 Taunton, 246, 2 E. C. L., 346; Ingram vs. Mitchell, 30th Ga. R., 547. The case of Showbridge vs. Macon, 2 Am. L. Review is opposed to Mrs. Alexander's Cotton Case, and overruled by Mouran vs. Insurance Co., 6th Wall. R., and

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consequently it and Erskine's decisions in 35th Ga., are in force. See Keppel vs. Petersburg R. R., by C. J. Chas. Richmond.

CASE NO. 2.

The Georgia Railroad and Banking Company, on the 1st of February, 1862, issued two certificates of deposit \$500 00 each, payable to the order of Eddleman. They were not paid; he sued upon them, and the main defense was that the deposits for which said certificates were issued were made in Confederate currency. He obtained a verdict for \$1,000 00 and costs. The company moved for a new trial, it was refused, and the cause came up. Here it was by the court sent argued with the case of Miller vs. Gould above. The authorities cited were in the main those already stated.

JOHNSON & MONTGOMERY, W. HOPE HULL, for plaintiff in error.

H. W. HILLIARD, for defendant in error.

WARNER, J.

This was an action brought upon a promissory note by the plaintiff against the defendant. The note was executed on the 12th day of July, 1862, the consideration of which was the loan of three thousand dollars Confederate Treasury. The defence set up against the plaintiff's right to recover was, that the consideration for which the note was given was *illegal* and void, for the reason, that said notes were not lawfully issued by the *assumed* authority of the Confederate States, then in rebellion against the Government of the United States, for the purpose of aiding and abetting said rebellion, and that the plaintiff had knowledge thereof. It may be conceded, that the issuing of Confederate Treasury notes by the assumed authority of the Confederate Government for the purpose of aiding and abetting the rebellion against the Government of the United States, was illegal, as against that Government and the citizens thereof, who, during

Under the actual protection of that Government, the military lines of the assumed Confederate authority, the question to be answered and decided is, whether a contract made between two citizens residing within the lines of the assumed Confederate authority, in ordinary business transactions, having no connection with the prosecution of the war, the consideration of which was Confederate Treasury notes, is to be held illegal as between the *contracting parties themselves*, in *fact* which existed at the time the contract was made, at the time of making this contract between the plaintiff and defendant, the authority of the Government of the United States had been displaced within certain defined limits by another government had been organized, which exercised dominion and control over the territory thereof. Although the Confederate Government was an illegal usurpation of authority, as against the Government of the United States, still, it was *in fact* an authority capable of making war, and maintaining its authority a time, over the territory and people embraced within the military lines. The Government of the United States recognizing *belligerent* rights during the war, recognized that a regular organized war existed, that the authority of the Government of the United States had been displaced, by an organization of such formidable power as to amount to an *organized war*. During this time, the contract in question was made. Under the circumstances which existed at the time and place of making the contract, Confederate Treasury notes were *not illegal* as between the *contracting parties themselves*. In fact, such notes were the only circulating medium in the country at the time, and the purchasing power thereof, at the time of making the contract, was but very little below that of specie. The contract was made between the parties in view of the fact that they *then existed*, and the consideration of the note was recognized to be so by the *actual governing authority* over them, whether rightful or wrongful, is not the question; the contracting parties were bound to

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obey it for the time being, and the contract was made in good faith in view of the law which was prescribed for their government by the governing authority which was over them at the time, and which had the *power to enforce it*. Therefore, as between the contracting parties themselves, at the time and place of making the contract, the consideration of the note was *not illegal*.

It does not appear that either of the contracting parties had any agency whatever in the *issuing* of the Confederate Treasury notes; they only dealt with them as the common currency of the country after the same had been issued and put into circulation by the organized authority which assumed to govern them, and which *in fact* did govern them at the time when the contract was made, which assumed authority they did not have the power to control or resist. This question came before the Supreme Court of North Carolina at its June Term, 1867, in the case of Phillips vs. Hooker, North Carolina Rep., 194. Chief Justice Pearson, in delivering the opinion of the Court in that case, says: "In 1862 the contest had assumed the magnitude and proportions of war, each party in its territorial limits had the boundaries of a mighty nation, and each party counted its people by millions. The Confederate States was recognized by the nations, and by the United States itself, as a *belligerent* power, entitled to the rights of war, and, in the exercise of its powers, it had issued paper as the representative of money, which excluded all other currency and constituted the only circulating medium of the country. The Government of the United States was unable to protect the people, and there was no currency but Confederate Treasury notes. In this condition of things, was every man to stay his ordinary avocations and starve, or else be tainted with treason, and be deemed guilty of an illegal act if he received a Confederate Treasury note? Was a judge to cease to do those duties required by the interests of humanity, the performance of which can never be considered as criminal, or was he to perform the duties and starve rather than commit an illegal act by receiving his salary in Confederate Treasury notes? Was the merchant to close his store,

blacksmith and shoemaker to quit work, and the farmer his tobacco and surplus grain rot on his hands, and his family to suffer for clothing and the other necessaries of life, or do an illegal act by receiving Confederate ? Really, unless the receiving of such notes can be acted with a *criminal intent* to aid the rebellion, the proposition seems to me too plain to admit of argument. A plain statement exposes the absurdity of the proposition. Courts must act on the presumption that Confederate notes were received in ordinary dealing, not for the purpose of aiding the rebellion, but because there was no other currency. It cannot be held that the mere receiving a Confederate note was illegal and base without involving in the condemnation of baseness every man and woman in the State. The minister of the Gospel, the judge who received his salary, the physician, the merchant, the mechanic, the farmer, the blacksmith, the shoemaker, the poor seamstress, all guilty of an act so base that the doors of the courts of justice must be shut against them. The proposition is monstrous !”

It was insisted on the argument of this case that dealing in Confederate Treasury notes gave them credit and circulation, and thus aided and encouraged the rebellion. As might it be said that the dealing in smuggled goods by the merchant or tradesman would aid and encourage smuggling. The Court pretended that either of the contracting parties now before the Court had anything to do with the original act of issuing and putting into circulation Confederate Treasury notes by the assumed Confederate Government. After the Confederate Treasury notes had been issued and put into circulation as currency by the assumed Confederate authorities, the parties dealt with it as they found it, the same being the circulating medium in the country as the representative money. Their contract was a new and independent transaction, after the illegal act of issuing the currency by the assumed Confederate authorities for the purpose of aiding and promoting the rebellion against the United States had

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been done. The distinction between the original illegal act and a new, independent contract is thus stated by Story in his Treatise on the Conflict of Laws, "If the new contract is wholly unconnected with the illegal act, and is founded on a new consideration, and is not a part of the *original scheme*, it is not tainted by the illegal act, although it may be known to the party with whom the contract is made. Thus, if after the illegal act is accomplished, a new contract (not being unlawful in itself) is made by the importer for a sale of goods to a retail merchant, and the merchant afterwards sells the same to a tailor, or to a customer who had no participation whatsoever in the original illegal scheme, such new contract will be valid, although the illegality of the original importation is *known* to each of the venders at the time when he entered into the new contract." Story's Conflict of Laws, 375, section 248. *Armstrong vs. Toler*, 11th Wheaton's Rep., 258. *Orchard vs. Hughes*, 1st Wallace's Rep., 73. *Rawdon vs. Toby*, 11th Howard's Rep., 493. In the case last cited, the payment of a note was resisted on the ground that it was given in Texas for the purchase of negroes *illegally* imported from Africa some years before and sold into slavery. The Court said in that case: "If the defendant should be sued for his tailor's bill, and come into Court with the clothes made for him on his back, and plead that he was not bound to pay for them because the importer had smuggled the cloth, he would present a case of equal merit." So here the defendant borrowed the Confederate Treasury notes of the plaintiff the purchasing power of which, at the time he received them, was nearly equal to specie, and who no doubt used them profitably in trade or otherwise, and now pleads that he ought not to pay the note, because the currency which he received from the plaintiff, and which he has profitably used was *illegally* issued by the assumed Confederate Government, which, in point of *fact*, exercised dominion and control over both of them at the time the contract was made, and recognized the *validity* of the currency for which the note was given. The contract was made in view of the *state of facts* which existed at the time it was made, and not

any connection whatever with the prosecution of the
against the United States, it was a legal and valid con-
s between the parties themselves.

it is contended that the Constitution of 1868 declares
contract to be illegal and void. If the Constitution of
had declared that the issuing of Confederate Treasury
by the assumed Confederate Government, or that the
which have been so issued, was *illegal and void*, then
contract now sued on would be a *mere nudum pactum*.
Constitution of 1868, however, does not declare that the
of Confederate Treasury notes, or that the Treasury
issued by the assumed authority of the Confederate
ment, shall be illegal and void, but on the contrary,
dly at least, recognizes that currency, in the sixth sec-
of the tenth article thereof, when it declares that judg-
rendered during the war shall be subject to be explained
the meaning of the word dollars as used in the same,"
to say, whether the word dollars meant gold or silver
s or *Confederate Treasury note dollars*. The bald, *naked*
ption is, that the Constitution of 1868 "not only de-
this contract to have been, and to be *illegal*, when the
derate Government, in aid of the rebellion, issued these
ices of debt to a citizen or subject of that Government, but
declares the evidences of debt so issued or used to be
nd void. The assumption is, it will be perceived, that
onstitution of 1868 declares this contract *now sued on*
ve been, and to be, *illegal*, when the *Confederate Govern-*
in aid of the rebellion, issued these evidences of debt,
t,) *Confederate Treasury notes to a citizen of that Gov-*
nt; that is the *first assumption* to maintain the illegal-
this contract. The second assumption is, that the
itution declares *the evidences of debt so issued or used,*
t,) *Confederate Treasury notes, to be null and void*.
let us examine the Constitution of 1868, and see whether
evidences of debt" mentioned therein embraces, or was
led to embrace, *Confederate Treasury notes issued by*
assumed Government. The consideration of the contract
sued on is *Confederate Treasury notes*. The evidence of

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the debt now sued on is the promissory note made by the defendant. The Constitution of 1868 declares that "All contracts made and not executed during the late rebellion, with the *intention* and for the *purpose* of aiding and encouraging said rebellion, or where it was the *purpose* and *intention* of any one of the parties to such contract to aid or encourage such rebellion, and that fact was known to the other party, whether said contract was made by any person or corporation with the State or Confederate States, or by a corporation with a natural person, or between two or more natural persons, are hereby declared to have been, and to be illegal, and all bonds, deeds, promissory notes, bills, or other evidences of debt, made or executed by *the parties to such contract*, or either of them, in *connection* with such illegal contract, or as the consideration therefor, or in furtherance thereof, are hereby declared null and void, and shall be so held in all Courts of this State when attempt shall be made to enforce *any such contract*, or give validity to any such obligation or evidence of debt." It is not pretended that the *contract* between the parties now before the Court was made with the *intention*, or for the *purpose*, of aiding or encouraging the rebellion, but on the contrary, it was a contract made between two citizens in the ordinary course of business, having no connection whatever with the rebellion, and the promissory note now *sued on* is not such an *evidence of debt* as is declared to be illegal and void by the Constitution. The contracts declared *illegal* by the Constitution are such as were made with the *intention*, and for the *purpose*, of aiding and encouraging the rebellion—contracts for the purchase of artillery or cavalry horses, contracts for the employment of substitutes in the army, or contracts for the purchase of munitions of war, and other contracts of like character, and not contracts made between two citizens for the loan of Confederate Treasury notes, the common currency of the country, which had no connection whatever with the rebellion, and the contracting parties had no *intention* or *purpose* to aid or encourage the same. The *fatal error* in the argument to sustain the illegality of this contract is in *assuming* that the Constitution

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declares that the *issuing* of Confederate Treasury notes by that assumed Government is *illegal*, and that *somebody* has made a *contract* with that Government for the *issuing* such notes, and that such notes being the consideration of the note ~~now~~ *sued on*, therefore, the contract between the parties in *this case* is null and void, a *mere nudum pactum*. There being no evidence in the record going to show that the contract between the parties in *this case* is embraced, or was intended to be embraced within the provisions of the Constitution, declaring void all contracts made with the *intention*, and for the *purpose* of aiding and encouraging the rebellion, it is the judgment of a majority of the Court that the judgment of the Court below be affirmed.

Judgment affirmed.

WARNER, J.—The case of the Georgia Railroad and Banking Company vs. F. M. Eddleman, involved the same question as that in Miller vs. Gould, both cases were argued together, and the judgment of the Court in that case controls this. Judgment affirmed.

MCCAY, J., concurred, but wrote out no opinion.

BROWN, C. J., dissenting.

I regret my inability to concur with the majority of this Court in the judgment rendered in this case. I admit that the natural equities are strongly in favor of the defendant in error, who was the plaintiff in the Court below. At the time he loaned the Confederate Treasury notes to the plaintiff in error, they formed almost the exclusive currency of this State, and had a market value in gold, and were received in all commercial and other business transactions as a circulating medium.

1. When this loan was made the people of the Confederate States, numbering over ten millions, and inhabiting a territory as large as several of the monarchies of Europe, had thrown off the authority of the Government of the United States, had set up in its place a government fully organized

in all its parts, Executive, Legislative and Judiciary, had organized and then kept large armies in the field, who had maintained its claims as an independent power with an undaunted courage and intrepid valor which challenged the admiration and commanded the respect of the civilized world.

The Federal Government had virtually declared war against this confederation of States, had proclaimed its ports in a state of blockade, had recognized it as a belligerent power authorized to conduct war, and had entered into cartels for the exchange of prisoners with it. This recognition of belligerent rights in the Confederacy by the Government of the United States was followed by similar recognitions by foreign Governments.

Now all must admit that money is not only necessary to conduct wars, but that it is the strongest sinew of war, and it would seem that the recognition of the Confederacy, which had vast armies in the field, as a power authorized to conduct war, upon the principles established by international law, for the government of civilized States engaged in martial combat, carried with it the further recognition of the right of the belligerent power to raise money by the use of its credit, and to issue and circulate notes or bonds for that purpose. That would seem, *as between the subjects* of the belligerent power, to be a sufficient consideration to support a contract made in the ordinary course of business, without any connection with the Government, or any intention to aid it, but simply as a commercial transaction, when there was no other currency in the country except these notes, which were recognized by all as the medium of exchange or standard of value.

This view of the question is strengthened when taken in connection with the well known maxim in government, that protection and allegiance are reciprocal obligations. The Government of the United States was at that time unable to afford protection to the people of the Confederate States. Its authority was displaced, its Courts were suspended, and it could command no officer, civil or military, within the limits of this State. Another government, complete in all its parts, was then supreme in Georgia.

is no answer to say that the great body of the people of Georgia, and the other Confederate States, aided the rebellion, thereby lost their right to the protection of the Government. There were still persons in Georgia (very few, it is true,) who adhered to the Government of the United States, and were loyal to it. *They* were certainly entitled to protection, and if the Government was unable to protect them, it had no right to claim their allegiance till it re-asserted its authority and extended its protection over the territory of their residence. See 4 Wheaton, 246; 2 Gallison, C. C. Reps., 191; 9 Cr., 191; 3 Pet., 242. They were therefore obliged to submit to the existing Government, and as they were obliged to make a living, and to have intercourse with those who remained in the country, they had no alternative but to use Confederate currency notes, the currency of the country, in their daily transactions. As the Government of the United States gave no better currency, it would be a harsh rule for it to declare that all their dealings and pecuniary transactions were illegal and void, when they were the result of uncontrollable necessity growing out of its failure to afford them protection.

For these and other considerations, I should feel strongly inclined to concur with the majority of this Court in the judgment they have pronounced, were it not for the emphatic and imperative language of our own State Constitution, which my oath of office binds me to support.

The 17th section of the 5th article of the new Constitution of this State contains the following language: "All contracts made and not executed during the late rebellion, with the intention and for the purpose of aiding and encouraging said rebellion, or when it was the purpose and intention of any one of the parties to such contract to aid or encourage said rebellion, and that fact was known to the other party, whether said contract was made by any person or corporation of the State or Confederate States, or by a corporation with a natural person, or between two or more natural persons, are hereby declared to have been and to be illegal; and all debts, deeds, promissory notes, bills, or other evidences of debt,

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made or executed by the parties to such contract, or either of them, in connection with such illegal contract, or as the *consideration* therefor, or in furtherance thereof, are hereby declared *null and void*, and shall be so held in all Courts in this State, when an attempt shall be made to enforce any such contract, or *give validity* to such obligation or *evidence of debt*. And in all cases where the defendant, or any one interested in the event of the suit, will make a plea, supported by his or her affidavit, that he or she has reason to believe that the obligation or *evidence of indebtedness* upon which the suit is predicated, or some part thereof, *has been given or used* for the illegal purpose aforesaid, the burden of proof shall be upon the plaintiff to satisfy the Court and jury that the bond, deed, note, bill, or other evidence of indebtedness upon which said suit is brought, is, or are not, nor is any part thereof, *founded upon*, or in any way connected with, any such illegal contract, *and has not been used in aid of the rebellion*; and the date of such bond, deed, note, bill, or other evidence of indebtedness, shall not be evidence that it has or has not, since its date, been issued, transferred, or used in aid of the rebellion."

Now, it does seem to me, that this provision of the Constitution is conclusive against the judgment of this Court in this case. It declares all contracts made and not executed, "by any person or corporation *with the State or Confederate States illegal*, and all bonds, deeds, promissory notes, bills, or other evidences of debt, made or executed *by the parties to such contract, or either of them, in connection with such illegal contract, null and void*. I presume no candid man will deny that Confederate Treasury notes were issued by the Confederate Government in aid of the rebellion. All contracts made by that Government for the purchase of artillery, army supplies, payment of troops, and for all other war purposes, were met by it by the issue and use of its notes. The first issue was in every case a contract between that Government and some person or corporation in aid of the rebellion, and each Treasury note was issued by the Government for that very purpose, which fact was well known to the parties

received it. It follows, therefore, beyond controversy, every such contract was a contract made by a person or person or persons in connection with the Government of the Confederate States of the rebellion. Every such contract is therefore made illegal by the Constitution of 1868, and every such contract or note issued by the Confederate Government in connection with such illegal contract, is declared null and void. No denial of the facts of history, and no ingenious sophistry, can escape this conclusion or change this well known fact. All *executory* contracts made during the rebellion, with a view of aiding or encouraging it, where such was the intention of one of the parties, and that fact was known to the other, no matter who were the parties, are expressly declared to be null and void, and to be illegal.

It does not stop here. It goes further, and leaves nothing to inference. It declares that *all bonds, deeds, promissory notes, bills, or other evidences of debt*, made or executed by any parties to such contract, or either of them, in connection with, or as the consideration of, or in furtherance of, any illegal contract, are null and void, and shall be so held by the Courts in this State where attempt shall be made to enforce such contract, or give validity to any such obligation or evidence of debt.

Strong and conclusive as this language is, it is made still more certain, if possible, by the further provision, that if the defendant, or any one interested in the event of this suit, shall make a plea, supported by affidavit, that he has reason to believe the evidence of indebtedness upon which the suit is based, or some part thereof has been used for the illegal purpose aforesaid, the burden of proof shall be upon the plaintiff to satisfy the Court and the jury that the evidence of indebtedness is not founded upon, or in any way connected with any such illegal contract, and has not been used in aid of the rebellion, before he can recover, and the date of the filing of the plea or evidence of indebtedness is not to be evidence as to whether it has or has not been used in aid of the rebellion. It is to be borne in mind that Confederate notes were issued by the Confederate Government to aid it in the execu-

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tion of its designs to set up an independent Government, and that this fact was *known* by every person who received such notes from that Government, and by all persons who subsequently received them in any transaction whatever. No one can plead want of notice. It follows, therefore, that the first issue of every such note was such a contract as the Constitution declares to be *illegal*, and that the note itself, which carries upon its face *notice* of this fact, is declared by the same Constitution to be *null and void*.

4. To all this it may be replied, that this suit was not brought upon the Confederate notes, which are null and void, but upon a note given by Miller to Gould *for* Confederate notes. This is true, and we are here brought to the consideration of *the question* made by this record. Can a note or other evidence of debt, which is declared by a statute or by the Constitution, which is of even higher dignity than a statute, to be illegal, null and void, be a sufficient *legal consideration* to support a contract? It is not denied that such note may have a market value, but the question is, can it have a *legal value*, and can a Court, under our Constitution, give *validity* to it by sustaining a contract for which it is the only consideration?

While there have been comparatively few instances, in which a note or other evidence of debt has been declared by statute to be illegal, null and void, I take it to be a well established rule, supported by an unbroken current of authorities, that no recovery can be had upon such a note or other evidence of debt, and that it can not be a legal consideration for another note, or to support any other contract.

The most familiar instances of this kind in the books grow out of the statutes against gaming and usury. These statutes declare that notes given for gaming consideration, or for usury, are *void*, and the Courts have held that no recovery could be had upon such notes, even in the hands of a *bona fide* purchaser without notice of the illegality of the consideration.

In the case of Bowyer vs. Bampton, 2 Strange, 1155, the suit was upon several promissory notes given for money

knowingly advanced to game with, in violation of the statute of 9 Anore. The notes had been indorsed by Church, the payee, to the plaintiff, for a valuable consideration without privity or notice, and it was held, after two arguments, that the innocent endorser could not recover upon them, for the reason, as the Court said, that to allow the recovery, even by the *bona fide* holder, without notice, is making the note of some use to the lender, if he can pay his own debts with it.

Comyn on Cont. 61, after referring to the Acts of 33 Hen., 8, 16 Car., 2 and 9 Ann, lays down the same rule in these words: "And these acts having declared the security void, it may be observed that a bill of exchange, given for money won at play, can not be recovered upon, though in the hands of an endorser for a valuable consideration, and who is totally ignorant of the circumstances affecting the security." See also Cannon vs. Bryce, 3 B. and Ald., 179; Byles on Bills, 106; Story on Prom. Notes, sec. 1928, note; 3 Kent's Com., sec. 44, pp. 79 and 80, (5th edition;) Chitty on Con., 615. So of a note given for an usurious consideration, under the Act of 12th Ann, which the statute declares to be utterly void, upon which no recovery can be had, even in the hands of a *bona fide* holder for a valuable consideration, without notice.

In Lowe vs. Waller, 2 Doug., 735, the action was brought by an innocent endorser, without notice, upon a note given for an usurious consideration, and after the case had been ably argued, Lord Mansfield, delivering the opinion of the Court, said: "I have considered this case very attentively, and I own with a great leaning, and wish, on my part, that the law should turn out to be in favor of the plaintiffs. But the words of the act are too strong. Besides, we can not get over the case of the statute against gaming, which stands on the same ground. This is one of those instances in which private must give way to public convenience." Lord Ellenborough made the same ruling in the case of Lowis vs. Mazzaredo, 1 Starkie's Rep., 386.

Thus the law stood in England, till the statute 58, Ga., 3,

changed it, and declared that such bills or notes given for usury shall not be void, in the hands of an endorser for a valuable consideration, without notice. But it has been held under the statute, that the holder of a bill who sues thereon must prove that he holds it for value, so soon as the defendant has shown that there was usury between prior parties to the instrument, Chitty on Con., 612.

The statute of this State, passed 27th March, 1759, establishes eight per cent. as the legal rate of interest, and declares all bonds, contracts and assurances, given for a greater per cent. *utterly void*. Marb. & Craw, Dig. 270. This act was amended by the Act of 22d December, 1822, which declared that such contracts, bonds, etc., "shall not be void, but the principal due thereon shall be recoverable at law, and no more."

In the case of *Baily vs. Lumpkin*, 1 Ga., 392, this Court was called upon to put a construction on this Act, and it was held that the note as to the interest was void, and that a note given for such usurious interest was void in the hands of a *bona fide* holder without notice. Nisbet. J., delivering the opinion of the Court, says: "It is very true that the Courts in England struggled hard to protect an innocent indorser against the plea of usury, because of the obvious hardship of the case. They, however, did yield to the irresistible force of the reasoning upon this subject, and determined that a security *void by statute*, as in the case of usury and gaming, was void in the hands of a *bona fide* holder without notice. The security being *utterly void* by law, it could acquire nowhere and in no way any vitality. A transfer for value to one ignorant of the taint could not breathe life into the contract. *Void* in the beginning, it was *void* forever and everywhere. The other reason for this determination of the British Courts is this: if an usurious contract could be enforced in the hands of a third person, then it would be the easiest thing imaginable to defeat the statute of usury. The public policy of the laws against usury imperiously required such a decision. It was consequently made, and for a long series of years acquiesced in." See also 3 Johns. Cases, 206; 1

28; 1 Greenleaf R., 167; 2 Caine's Reps., 150; 10, 121; 3 Doug. Reps., 268. And as to illegality of circulation see Chitty on Cont., 574; Addison on Cont., Story on Sales, sec. 499; Byles on Bills, 103; Comyns on Cont., 59.

It is abundantly established by the authorities cited, that the market value of the note or bill at the time of the sale can be taken into the consideration. The gaming notes, and those given for an usurious consideration, in each of the above cases had a market value. In each case the *bona fide* holder purchased without notice, and paid, and the payee received, a valuable consideration for the note or bill. But they had no legal value, because declared void by statute, and therefore no recovery could be had upon them, no matter in whose hands they might be.

Let us pursue the inquiry a little further. Can a recovery be had in a Court established by the Constitution, for a note given for a consideration which the Constitution declares null and void? If authority is to govern, unquestionably it cannot. In *Craig et al. vs. The State of Missouri*, 410, the Supreme Court of the United States has decided that no such recovery can be had. By Act of 27th March 1821, the Legislature of the State of Missouri established loan offices, and directed the officers of the Treasury, at the direction of the Governor, to issue certificates to the amount of \$200,000, of denominations not exceeding ten dollars nor less than fifty cents. These certificates were to be receivable at the Treasury, and by the tax gatherers and public officers, in payment of taxes or money due, or money due to the State, or to any town or county therein; by all officers, civil and military, in the State, in discharge of salaries and fees of office; and in payment for salt made at salt springs, owned by the State, and to be afterwards redeemed by the authority of the Legislature. A provision was made by law for the gradual withdrawal of the certificates from circulation, and all the certificates had been withdrawn and redeemed by the State at the time the litigation was pending.

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It was also provided by the statute that the commissioners might loan said certificates, in sums less than \$200 00, on personal securities, by them deemed good and sufficient, which securities should be jointly and severally bound for the payment of the amount so loaned, with interest thereon. Craig borrowed the certificates thus issued, and gave his note, signed also by John Moone and Ephriam Moone, for \$199 99, which certificates had a full par value, and were used as money by the maker of the note, and afterward redeemed by the State at full par value. There was, therefore, no pretence that there was in fact any failure of consideration. Craig borrowed the certificates and gave his note for them in that case, as Miller borrowed the Confederate Treasury notes, and gave his note for them, in this case. The cases are alike, with this difference, that the certificates borrowed by Craig were worth par in the market. Those borrowed by Miller, the plaintiff in error, in this case, were worth about fifty cents in the dollar when he received them. In that case the statute of Missouri declared the certificates and the notes given for them, valid. In this case the Constitution of Georgia declares the Confederate Treasury notes, issued in aid of the rebellion, null and void. That was, then, a stronger case in favor of the plaintiff in the Court below than the case at the bar.

In that case the Supreme Court of the United States, Chief Justice Marshall delivering the opinion, held that the certificates issued by the State of Missouri were bills of credit, and as the Constitution of the United States declares that no State shall "emit bills of credit," these certificates or bills of credit issued by the State of Missouri were void, and being void, as prohibited by the constitution, that they were not a legal consideration to support a contract, and that no recovery could be had upon the note given by Craig for them, notwithstanding they were worth par in the market when he secured them, and were used by him as money.

I make the following quotation from Chief Justice Marshall's opinion in that case, which is so strongly in point in this that I make no apology for its length: "The certificates for

which this note was given being, in truth, 'bills of credit,' in the sense of the constitution, we are brought to the inquiry: 'Is the note valid of which they form the constitution? It has long been settled, that a promise made in consideration of an act which is forbidden by law, is void. It will not be questioned, that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a State to 'emit bills of credit.''' The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission, the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States. Cases which we cannot distinguish from this in principle, have been decided in State Courts of great respectability, and in this Court. In the case of the Springfield Bank vs. Merrick, *et al.*, 14 Mass., 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in *consideration* of those bills, instead of being made payable in them, *it would not have been made less repugnant to the statute*, and would consequently have been equally void.

In Hunt vs. Knickerbocker, 5 Johns. Rep., 327, it was decided that an agreement for the sale of tickets in a lottery, not authorized by the Legislature of the State, although instituted under the authority of the government of another State, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of Massachusetts and New York, abound with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle

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itself. It has never been doubted, that a note given on consideration which is prohibited by law, is void. Had the issuing or circulation of certificates of this or any other description been prohibited by a statute of Missouri, could a suit have been sustained in the Courts of that State, on a note given in consideration of the prohibited certificate? If it could not, are the provisions of the constitution to be held less sacred than those of a State law?

It had been determined, independently of the Act of Congress on that subject, that sailing under the license of an enemy is illegal. *Patton vs. Nicholson*, 3 Wheat., 204, a suit brought in one of the courts of this district, on a note given by Nicholson to Patton, both citizens of the United States, for a British License. The United States were at war with Great Britain; but the license was procured without any intercourse with the enemy. The judgment of the Circuit Court was in favor of the defendant, and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the Court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase or sell to another such a license to be used on board an American vessel. The consideration on which the note was given being unlawful, it follows as a course, that the note was void. A majority of the Court feels constrained to say, that the consideration on which the note in this case was given, is against the highest law of the land, and that the note itself is utterly void."

It is proper to remark that three of the Justices dissented from the opinion of the Court, on the ground that the certificates issued by the State of Missouri were not, in their opinion, bills of credit within the meaning of the constitution.

Mr. Justice Johnson, in his dissenting opinion, admitted that the note given for the certificates would be void, if they were bills of credit, prohibited by the constitution. His language is:

"In the argument of counsel the objections to this tract were presented in the form of objections to the

tion. But this was unnecessary to his argument, since a valuable consideration will not make good a contract itself illegal. These notes originate directly under the Missouri; they are taken in pursuance of its provisions, have their origin in it, and rest for their validity upon it. If that law be void, must fall with it. Whether, therefore, the bills for which they were given be void or not, if the law be void, the notes would be so."

The case of Sherman, survivor, vs. Barnard, in 19th Barb. 291, fully sustains the position for which I contend. The Legislature of New York, on the 10th of July, 1851, passed an Act "to provide for the completion of the Erie Canal enlargement, and Genesee Valley and Black River canals," which provided for the issue of a large amount of notes of indebtedness for the completion of the work. Barnard sold and transferred a certain written contract, with the rights therein, to Sherman and Moore, which was between himself of the one part, and the canal commissioners and the division engineers on behalf of the people, of the other part, by which it was agreed that Barnard should execute a certain section of the Erie Canal enlargement, and should be paid therefore a compensation provided by said Act, out of the surplus revenues of the canals, and the proceeds of sales of canal revenue certificates, as authorized by said Act. And Sherman and Moore executed several promissory notes, amounting in the aggregate to \$2,000 00, and delivered them to Barnard for his interest in said contract.

At the time of the trade a case was pending before the Court of Appeals of New York to test the constitutionality of the Act authorizing the canal enlargement, and the validity of said certificates, and it was agreed by Sherman and Moore to take the risk and pay the \$2,000 00, whatever be the decision of the Court of Appeals as to the constitutionality and validity of the Act, or as to the validity of the contracts made under it.

The Court of Appeals afterwards decided, 3 Selden, 9, that the Act was unconstitutional and void, and as a consequence, the contracts made and certificates issued under it were

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unauthorized, and that the people of the State were not in any sense bound by them.

After this decision, Sherman, as the surviving member of the firm, filed his bill to enjoin Barnard from transferring the notes, and to compel him to deliver them up to be cancelled, and prayed that Siseon and Chapman, to whom Moon had made part payment for Barnard, be restrained from paying over the money to Barnard, etc. The Court below held that Barnard was entitled to recover upon the notes, and upon appeal, the Supreme Court reversed the decision, and ruled that the sale of an absolutely void chose in action will not form any consideration for a promise. Judge Strong, delivering the opinion of the Supreme Court, says: "But independent of the decision, the naked legal proposition that the sale of an absolutely void chose in action will not form any consideration for a promise is, I think, incontrovertible. If void, no legal obligation is created by it, and it is in view of the law, as if it did not exist. Void things are as no things, and some value is essential to a valid consideration. (Story on Contracts, sec. 443.) The principle is the same, notwithstanding such chose in action, is saleable in market for even the full value that would attach to it if valid. If the law does not recognize it as having some binding force, and will not enforce it, a note given for the sale of it will be invalid for want of consideration. It has no intrinsic, no legal value, and therefore in law no value. Although saleable in market, if the sale is on credit, no legal debt is thereby created; payment may be resisted for want of consideration, and if the sale is for cash, if the money paid can not be received back, it is not because a consideration was received for it, but upon the principle which precludes the recovery of money voluntarily paid with a full knowledge of all the facts."

Rodman vs. Munson, 13 Barbour, 63, involves the same question as to the validity of a note given for part of said "canal revenue certificates," referred to in the case last cited. The Court in this case holds the Act authorizing the Comptroller to issue the certificates to be unconstitutional and

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rative, and the certificates to be wholly null and void, that the note given for said certificates is without consideration, and that its payment can not be enforced.

The same question was again before the Court, in the same case, p. 188, and the same judgment was pronounced. Pages 194 and 195, the learned Judge, after stating that the defense set up is that the note was given for canal revenue certificates under the Act of 1851, which is in conformity with the constitution, and that the certificates did not constitute a consideration to support the note, uses this language: "The first point raised by the plaintiff's counsel is that the canal revenue certificates had a marketable value, and was at all events a sufficient consideration for the note. The fact that a paper would sell in market does not of itself render it available as a consideration, as there are persons who would willingly purchase counterfeit bills, or notes given for gambling debts, or otherwise *contra bonos mores*, but surely none of these would give validity to a contract. The rule is, that a consideration is sufficient when it has any legal value, but insufficient where it has none. It is so laid down substantially in the case of Johnson vs. State, 2 Hill, 606,) quoted by the plaintiff's counsel, and the authorities there cited by the late Judge Cowen. The important question in this case is, whether the canal revenue certificate was in law valueless, and it certainly was so, if the act under which it was issued was unconstitutional."

It has been decided that there can be no recovery on a note given for the purchase of a ticket in a lottery prohibited by law. Hawkins vs. Cox, 2 Cr. C. C., 173, and in Thompson vs. Milligan, Ibid, 207. So, in New Jersey, a conveyance founded on a lottery consideration, is void, though the lottery was contrived and drawn in another State. 4 W. C. 129.

The statute 24 Ga., 2, c. 40, prohibits persons from recovering a debt incurred by sale of spirituous liquors, in less quantities than of the value of twenty shillings, and when the consideration for a bill was spirituous liquors within the statute, and part for money lent, it was holden

wholly void in the hands of the payee. So a bill of exchange accepted to secure payment of money, taken at the door of an unlicensed theatre, is void in the hands of the payee, who knew the theatre to be unlicensed. *Byles on Bills*, 110. An action cannot be maintained to recover the price or value of libelious or immoral pictures sold by the plaintiff to the defendant. *Forbes vs. Johns*, 4 *Esp.*, 97. And Best, C. J., held that the plaintiff, a printer, could not recover any remuneration for printing "The Memoirs of Harriet Wilson," it being a work of grossly immoral and libelous character. *Poplett vs. Stockdale, R. and M.*, 357.

In all these cases, as in the case at bar, the consideration of the note or bill had a marketable value, and the maker of the note received actual value. But as the law declared the consideration to be illegal and void; as the Constitution of Georgia declares the Confederate notes in this case, "to have been and to be," no recovery could be had, because the consideration had no legal value. There must not only be a consideration, but in the just sense of the law it must be legal as well as adequate. *Story on Prom. Notes*, sec. 183; *Chitty on Bills*, ch. 3, sec. 1, p. 78-85, (8 ed., 1833;) *Bayley on Bills*, ch. 12, p. 494-495, (5 ed., 1830).

The Courts will not enforce a contract founded on a dealing in Confederate Treasury notes. *Nordlinger vs. Vaiden*, 2 *Am. L. Rev.*, 188. *Bank of Tennessee vs. The Union Bank*, *Ibid*, 346.

The same ruling has been made by Judge Erskine, the learned and able United States District Judge for this State, in the case of *Baily, Trustee, vs. Milner*, reported in 35 *Ga. Reps.*, 330; and *Scudder vs. Thomas*, 35 *Ga.*, 364.

I might multiply authorities, but deem it useless. Those already cited seem to me to establish the position beyond all question that there was no legal consideration for the note, which is the foundation of this suit, and that the judgment of the Court below ought to be reversed.

5. Before concluding this opinion I remark that the Constitutional provision applies only to *executory* contracts, or to cases where an effort is made to give validity to bonds, deeds,

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bills, or other evidences of debt, used in aid of the rebellion, and not to contracts which have been fully executed by the parties. If Miller had paid the amount called for by this note to Gould, the Courts would not aid him to recover it back. In all cases of contracts made during the war, in which Confederate Treasury notes were used, and the contract fully executed, the Courts will aid neither party, but will leave them where they find them. *In pari delicto potior est conditio defendentis.*

JOHN A. LONG, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. It is too late after arraignment, and the case is before the jury, to object to an indictment on the ground that it fails to allege the residence of the defendant.
2. When it appeared from the record that the venue in a murder case was changed, on the motion of the prisoner, at the April Term, 1868, from Gordon to Bartow county, and the case was called for trial at the November Term, 1868, of Bartow Superior Court, the defendant is charged with notice that the case will then and there be called, and he cannot excuse himself for want of diligence in preparing for trial, by his affidavit that he did not know the case had been moved to Bartow county, and would be called for trial at the next regular term.
3. The simple fact that the defendant has been in jail, in a distant county, does not excuse him for want of diligence in preparing for trial.
4. The unexplained absence of the counsel, on whom the defendant "mostly relies," is not a good ground for continuance.
5. When a motion is made to continue a criminal case, at the calling of the case, the movant must take all his grounds; he cannot, after his motion has been overruled, file a special plea, based upon facts known at the time of the first motion, and then move to continue because not ready to try that plea.
6. This Court will not interfere with the judgment of the Circuit Judge in a matter left by law in his wise, legal discretion, unless it appears affirmatively that the discretion has been abused.
7. The plea of insanity, provided for in section 4284 of Irwin's Code, is, in its nature, a plea, the object of which is to prevent a trial on the merits, and though it may cover insanity at the time of the act, its essence is that the prisoner is insane at the trial, and it must contain that allegation.

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8. It is not error for the Court, in a criminal case, to refuse to charge the jury that if from *any cause* they have doubts of the prisoner's guilt, they must acquit, and to charge instead, that *any cause* is too sweeping, but that if they have any reasonable doubts which arise from, or grow out of the evidence, they must acquit.
9. The jury, in a murder case, have no right in this State authoritatively to recommend, in lieu of the death penalty, imprisonment for life, except in cases where the conviction is founded solely on circumstantial evidence, and it is no ground for a new trial that the Judge in this case said to the jury, "if there are palliating circumstances, or good legal reasons, you may so recommend."

Murder. Motion for new trial. Decided by Judge PARROTT. Bartow Superior Court. September Term, 1868.

John Long, as principal, and John C. Duff, as accessory, were indicted for murdering Abraham B. Echols, in Gordon county, Georgia, on the 16th of October, 1866. The bill of indictment was silent as to where they resided. Because a jury could not be had in Gordon county, in April, 1868, the Judge, on motion of prisoner, ordered that said case should be tried in Bartow county. On the 21st of September, 1868, the case was called, and the defendant's attorneys stated that they intended pleading insanity, and asked the Judge for an officer to send for witnesses; but he said it would be time enough when the issue was made. On the 24th of September, 1868, the case was called for trial. When Long was arraigned his attorneys wished to plead nothing but insanity; the Court required a plea of "guilty" or "not guilty," and thereupon they plead "not guilty" and insanity at the time of the killing. Simultaneously Long moved for a continuance upon the grounds: 1st. That Nicklin was his attorney, on whom he mostly relied, and whom he had partly paid; that he was absent, as he believed, because he had not been informed that said case had been transferred from Gordon county; that Long himself did not know of this transfer till the 22d instant, when the officer went for him to Milledgeville, Baldwin county, where he had been confined since the finding of the bill of indictment; that he had had no opportunity of corresponding with Nicklin; that he believed Nicklin believed said case would

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omplete justification for Long; that he posi-

nat three or more of said witnesses were present

se, knew all the facts, and would be compelled to

aforesaid, and finally, that this motion was not

delay, but to obtain a fair trial.

dge asked what facts the defendant expected to

ach of said witnesses, but his counsel would not

e form of the motion. The continuance was not

ut for some cause, unexplained by the record, the

ot proceed then.

e was again called on the 28th of September, 1868.

neys reiterated his showing for a continuance as to

absence, and asked a continuance for the further

the absence of J. N. Carter, of Hall county, T. L.

Whitfield county, who had been *subpoenaed*, and of

is, of Pickens or Gilmer county, whose name he had

ained, by whom he would prove the facts aforesaid

he approaching him with a pistol at the time of the

he formal parts of the showing were all correct.

neys introduced John Hays to prove that Lewis and

present at the killing, and Hays stated that there

other persons present in Court who were present

DECEMBER TERM, 1868.
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at the killing. The Court refused to allow the continuance. A special jury was empannelled to try the issue of insanity.

On the 29th of September, 1868, they again moved to continue, submitting as a showing an affidavit by Long that he was not ready to proceed with the issue of insanity because of the absence of Campbell Wallace and twenty-seven other witnesses, (naming them,) of Walker county, Georgia, by whom he expected to prove that, at the time of the killing, Long was laboring under insanity or mental aberration, and that he had been, for some time previously, so afflicted, and because of the absence of said Lewis, said Cox, and said Carter, by whom he expected to prove the same facts. With this was an affidavit by Jesse A. Glenn, one of Long's attorneys, stating that on the 21st of September, 1868, he had asked for an officer to send for these witnesses, having stated his intention to plead insanity as aforesaid, and that the Court would not then send, and that, at each calling of the case since, he had notified the Solicitor General of his intention to rely on said plea. The Court ordered the case to proceed. The defendant's attorneys offered no testimony, nor would offer any. Thereupon, the Court ordered the plea of insanity stricken, and that the case should be tried under the plea of not guilty.

The case was submitted to the jury, and a witness for the State was sworn and was about to be examined. Then Long's attorneys moved to quash the indictment because the indictment was silent as to Long's residence; it wanted the words "of the county and State aforesaid" after the defendants' names.

The Court overruled the motion, holding that that averment was unnecessary.

The testimony for the State was as follows:

R. C. BOON sworn said: I was present when deceased was killed, in October, 1866, I think the 10th, in Gordon county; I first saw Long at Calhoun; he was in search of a horse on Wednesday evening; I and Mr. Echols went home from Court; I was eating supper and heard a noise in the lane; sent my son out to see; heard some one coming; and saw Long

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mening to shoot my son, with pistol in hand; Long said would shoot me if I came where he was; he then got on horse and galloped off between my house and Echols'; I saw Long, and know it was the same man with Duff, that the horse Long had, there was a dispute about; Long rode off up the lane; he was bareheaded and the horse was without a saddle; I was standing in the yard; he rode on back; deceased was feeding his hogs as Long rode by; Long called to deceased to come to him; deceased said he would be there in one minute; deceased went to the house, set his bucket down, turned back toward where Long was and asked Long what he wanted; Long said he was hunting an horse thief; deceased asked Long what kind of an horse; Long said a gray horse, as well as I recollect; deceased asked who stole the horse; Long answered "Adair"; deceased said nothing more, that I heard; Mr. Cox asked Long if he were not the man who passed there a few minutes before; Long said he was not; Cox asked Long why he had no saddle, and why he was bareheaded; Long said he lost that while hunting this thief; Cox asked Long who were with him; he said two or three men were with him, and he fired at deceased and killed him; I remember nothing was said, if anything was; Long then rode off and hallooed; Cox said, "follow him, gentlemen;" Long hallooed and said, "come on and I will wait for you;" the first ball struck deceased just over the left eye, and the ball lodged in the back part of his head; I examined the wound; Long was about three feet from deceased when he shot; there was only deceased's fence between them; deceased was on the side of the fence next to his house; the killing was between sunset and dark; deceased had been home some time before he was killed; deceased was Clerk of the Superior Court; it was two hours, by the sun, when I and deceased went home; when the pistol fired deceased dropped back and fell; don't suppose he moved after he was shot; Long went away, after the shooting, as fast as his horse would go; I saw Long several times between Monday and Tuesday; never saw the horse till Long, Duffy and King

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brought him in and were disputing about him ; Long did the shooting ; Cox was somewhere in the yard when Long came up ; Miller was in the yard, between the house and the fence ; Cox was by the side of the deceased when he was shot ; Miller was on the left and Cox on the right of deceased when he was shot ; I was a jurymen, that week, in Gordon county ; was in Court Monday, Tuesday and Wednesday ; and deceased was discharging his duty as Clerk ; my house is some fifty yards from deceased's ; I was sworn on the committing trial in this case ; I swore then that deceased was about feeding his hogs ; I was saddling my horse as Long came between deceased's house and mine ; I heard the conversation between Cox, Long and deceased ; deceased was standing against the fence, and had his foot on it ; the fence was some forty feet from deceased's house ; I am not positive whether it was Monday or Tuesday, when I first saw Duff ; I served on the jury three days that week ; was on the petit jury ; I have had no conversation as to what I should swear in this case ; I was some thirty feet from deceased when he was shot.

WILLIAM MILLER sworn, said : I was with deceased when he was killed, not more than five feet from him ; it was in Gordon county, Wednesday night, 10th October, 1866, between sun-down and dark ; deceased was standing at his gap in front of his dwelling-house, on the inside of the fence, about fifteen steps from his dwelling-house ; I saw him when he went to the gap ; he and I first went to the gap ; we were going to feed the hogs, and were at the gap to pour in their slop ; I returned to set my bucket down, and returned to the piazza ; I and deceased walked on in the direction of the gap ; the man who shot deceased was sitting on his horse at the fence ; deceased said to that man " how do you do ? " the man said he was hunting a horse-thief ; deceased asked him whom he suspected ; he answered, " a man named Adair ; " " very well," said deceased ; the man who shot deceased said, " hold on a minute or two, and I will assist you ; " a word or two passed, but nothing in anger, when that man drew his pistol and shot deceased down by the fence, not being over three

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from deceased when he shot him ; the man immediately fled off and brought a scream as he did so.

I can not identify Long as the man who shot ; the man was a stranger to me ; he was on a gray horse ; the horse was without a saddle, and the man bareheaded ; deceased, and the man who shot him, did not converse more than fifteen minutes before deceased was shot ; deceased fell to the ground at the crack of the gun ; (I suppose the shot was with a pistol) the man instantly left, after the shooting, as fast as his legs could go ; I went to deceased immediately ; he never moved hand or foot, nor breathed, after he was shot ; he was sick just over his left eye ; I saw blood escaping from the ear-hole and from the ears ; I think the bone of the skull, the back part of the head, was broken ; Mr. Cox and I were present when deceased was shot ; Boon was near by, but did not see him when deceased was shot ; Boon was not sent at the shooting ; no one but myself and Cox were sent, so far as I know ; I was at work for deceased ; Cox went out of the house with deceased ; we went out in the same place to feed the hogs.

K. C. BOON re-introduced, said ; When I first saw Long, he was very drunk ; deceased had no weapons when he was killed, and was making no effort to hurt Long.

WILLIAM MILLER re-introduced, said : I did not see deceased, Cox, or any one at deceased's house, have any kind of weapons ; no angry words was said by deceased to prisoner in any way ; they might have had arms without my knowing it.

J. W. REAVES sworn, said : I was not present when deceased was killed ; I saw wound right above left eye, made by a ball ; it passed through the head and lodged against the brain on the opposite side ; the skull was broken, back and front ; I saw brains and blood escaping from the wound ; I have seen Long before, saw him in Calhoun on the day before deceased was killed ; saw Long frequently during that day ; the first time I saw him he was holding a horse owned by John Duff, a gray or white horse ; I don't remember about the horse being saddled ; the next time I saw him was the day

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after the killing, about two or three o'clock ; Long was on the same horse, in the woods, about a mile to the left of Calhoun ; he was bareheaded, and the horse was without a saddle ; Long, the prisoner, is the man I saw the day of the killing ; the whole county was in pursuit of him, because he was charged with killing deceased ; it was from 1 to 10 or 12 o'clock, and perhaps a little later ; Long had on him three Colt's pistols when found, each shoots six times, but one had one barrel of it discharged ; I arrested Long ; he said, at the time of his arrest, that is, the first word was, "do you want this horse," or he might have said, "are you hunting me?" I took the pistols and carried them to town ; handing Long the pistol with an empty barrel, I asked him if it was the one with which he killed deceased, and he said it was ; I am a practising physician ; said shot killed deceased ; pistols generally sell from \$15 00 to \$18 00 ; I never saw Long and Duff in town except on the day of this killing. Carter's quarter is in the direction of deceased's house, but that is not the best road ; Long was drinking on the day of said killing ; it was up in the day sometime when deceased was killed, and it was one or two o'clock when Long was seen drinking.

The defendant's attorneys introduced no testimony. After argument they requested the Court to charge the jury as follows :

1st. "The jury are the judges of the law and the facts, and are bound, under your oaths as jurors in this case, to decide the law according to your own opinion of the law ; they may differ from the Court in its charge to them as to the law. If you conscientiously differ with the Court as to the law, and fail to carry out that difference, you would be guilty of perjury."

2d. "If there is a reasonable doubt in the minds of the jury, from any cause, as to the guilt of the prisoner under the charge of murder, then the jury can not find the prisoner guilty of that charge ; that the jury are there to consider as to the offense of manslaughter, and if then should be a reasonable doubt in the minds of the jury, from any cause, then the jury can not find the defendant guilty of man-

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ughter; you should be governed by this rule in the investigation of the several grades of manslaughter, and if reasonable doubts should go through the case, on each grade of homicide, then you should acquit the prisoner."

3d. "If the jury believe that the prisoner was, at the time of the commission of the act, surrounded by such circumstances as would excite the fears of a reasonable man, that the deceased, or those who were approaching him, intended to commit a personal injury upon him amounting to a felony, then the killing must be justifiable homicide; that is the law; whether deceased really intended or not to injure the prisoner, the law does not look alone to deceased's intention, but to the circumstances which would cause a reasonable man to act."

What the 4th request was, does not appear by the record.

5th. "Mental alienation, from any cause whatever, at the time the deed was done, to the extent that the accused did not know what he was doing, will rebut the presumption of malice arising from the apparent recklessness of his (defendant's) conduct so as to reduce the offence from murder to manslaughter."

6th. "That while drunkenness is no excuse for crime, yet you must consider of it, as a means of coming to a conclusion in arriving at the intention of the accused, and his state of mind at the time, so as to show the absence of malice, and the apparent recklessness of his conduct might be so far excused as to reduce the offence to manslaughter."

After giving in charge all the grades of homicide, the Judge proceeded to charge the jury as follows: "If you believe, from the evidence in this case, that Long shot Echols through the head, and the evidence has not disclosed circumstances of mitigation, the Court charges you that this is such an external circumstance, capable of proof, as may establish express malice, and if this act killed Echols, and the proof does not show it to be voluntary manslaughter or involuntary manslaughter, or justifiable homicide, it is murder, and it is your duty to find."

When a homicide is clearly proved, malice is presumed



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by the law, unless the testimony discloses circumstances and rebuts that presumption. If the jury believe that Long shot and killed Echols intentionally, he is presumed to intend the natural and proximate consequences of his own acts, and if it is not shown that Echols, or those with Echols and co-operating with him, assaulted Long or attempted to commit a violent, personal injury to Long, or did some other act equivalent to these, it will be your duty to find Long guilty of murder.

Malice shall be implied wherever no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart. This law shows that when a person shoots into a crowd, or toward a person unknown to the slayer, and kills another in a reckless manner, and when the circumstances show a disregard of human life or human safety, that malice is implied. In this case, it may appear that both express and implied malice is shown. The Court has already charged you as to express malice. If the evidence shows that Echols had given Long no considerable provocation, and he was unknown to Long, and that Long wantonly shot and killed him, malice is implied, and the killing is murder, and the jury should so find."

He then gave in charge the first of said requests. He read the second to the jury, saying that he declined to charge it, and added that if they had reasonable doubts with the several grades of homicide, and those doubts arose from or grew out of the testimony in the case, the position taken was right; that the words "from any cause" were too sweeping, and should be understood thus: "from any cause shown by or originating from the testimony in the case."

He declined charging the third request. Reading it to the jury, he said: "Unless deceased, and those with deceased and co-operating with him, intended or showed to prisoner that they intended to commit a violent personal injury on prisoner, amounting to a felony, the prisoner would not be justifiable in killing deceased. If A and B were approaching C, and exhibiting evidence of felonious injury on C, it would not justify C in killing D, who has nothing

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o with A and B. What a stranger or third party did proposed to do could not justify Long in killing Echols, as Long had been given reason to infer that Echols intended to harm him seriously."

he fourth request he refused. Reading it to the jury, he

"With regard to this charge, unless the evidence is that the accused had good reason to believe that Echols, or some one acting in conjunction with him, were about to commit some injury upon the accused, the accused had no right to shoot deceased, and unless Echols had something to do with the circumstances surrounding prisoner, or prisoner had good reason for believing that Echols was engaged in them, the circumstances surrounding prisoner do not justify him in shooting Echols.

he refused to give in charge the fifth and sixth requests, with reference to drunkenness, charged as follows:

Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud or artifice or contrivance of other person or persons, for the purpose of having the crime committed, and then the person or persons so causing said drunkenness, for such malicious purpose, shall be considered a principal, and suffer the same punishment as would have been inflicted upon the person committing the offence if he, she, or they, had been possessed of sound reason and discretion.

From the law it will be found that drunkenness is no excuse for the killing of Echols, unless the evidence discloses that the drunkenness was procured by the fraud of some person to procure the commission of the offence. Evidence of drunkenness may be given in to rebut the presumption of malice where provocation is shown on the part of the accused, to show that the accused might by some provocation have been more easily excited when drunk than if he had been sober, and thus made subservient to irresistible passion, but if the evidence does not show that deceased provoked defendant, or did something to excite his animosity, if there is no proof that he was drunk, it could not inure to his advantage.

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If your minds rest satisfied beyond a reasonable doubt that the accused did shoot and kill A. B. Echols, the deceased, with malice aforethought, either express or implied, it is your duty to find the defendant guilty. If you believe that there are palliating circumstances, and that there is a good legal reason for so finding, you may recommend that he be confined in the penitentiary for life; it requires your recommendation to have his punishment reduced from death to imprisonment for life."

The balance of the charge was only directory as to the form of their verdict.

The defendant was found guilty of murder. His attorneys moved for a new trial upon the following grounds:

1st. The refusal of the continuance upon the affidavit of the 28th of September, 1868, when the case was last called for trial.

2d. Because the Court required the defendant to state in his affidavit of 24th of September, 1868, what he expected to prove by each of his witnesses.

3d. Because the Court erred in requiring the defendant to plead not guilty when he proposed to plead insanity, and required both pleas filed simultaneously.

4th. Because the Court erred in refusing the application for continuance, on the ground of insanity, under the affidavits of 29th, September, 1868, aforesaid.

5th. Because the Court erred in ordering the issue of insanity withdrawn from the jury when he did.

5th. Because the Court erred in pressing defendant to trial without calling on him to plead "guilty or not guilty."

7th. Because the Court erred in not quashing the indictment for the reason stated, and at the time when the motion was made.

8th. Because the charge was not sustained by the law or facts of the case.

9th. Because the Court erred in refusing to charge as requested, and in qualifying the requests as he did.

And last. Because the verdict was contrary to the law and evidence.

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The Court refused a new trial, and this is assigned as error upon the grounds aforesaid.

JESSE GLENN, for plaintiff in error.

W. H. DABNEY, (representing the Solicitor General,) for defendant in error.

MCCAY, J.

This killing took place in April, 1866, in Gordon county. The venue was regularly changed at April Term, 1868, by order of the Court, on motion of defendant.

When the case was called at the place of the new venue, at November Term, 1868, the defendant moved to continue, on his own affidavit, that he only knew, a few days before, that the venue had been changed; that the attorney on whom he relied was not present, and he supposed he did not know of the change of venue; that there were various witnesses absent, who were present at the killing, by whom he could prove that, at the time of the killing, deceased was approaching him in a threatening manner, etc. This showing the Judge overruled, because it failed to state what facts he could prove by each witness, and because the affidavit itself only stated positively that *three* of the witnesses mentioned were present at the killing, and the Court knew, from *its own* insight, that one of those witnesses was present then in Court, and that three other persons, whether among those named or not did not appear, who were also present at the killing, were also present in Court. The fact was also apparent, that the prisoner had seen and conversed with none of the witnesses of whose absence he complained, and only knew of their acquaintance with the facts by his information from others that they were present. Yet four of those present at the killing were also present in open Court at the trial.

There was nothing in the first motion about insanity. The motion to continue was overruled and the case set down for trial.

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When the hour arrived the defendant, with his plea of not guilty, filed a plea of insanity, and made another motion to continue, on the ground of absent witnesses, to sustain his plea of insanity. This the Court overruled, on the ground, that this ground of continuance ought to have been made with the other.

When the prisoner was arraigned, the Court required him to plead guilty or not guilty. This he objected to, but proposed to plead insanity. The Court permitted this plea, but required also the plea of guilty or not guilty.

On the trial before the special jury of the plea of insanity, no evidence was introduced on either side, and the Court withdrew the plea and discharged the jury.

After the case had gone to the traverse jury, the prisoner's counsel objected, that the indictment did not state the residence of the prisoner.

The charges of the Court and failure, are fully stated by the Reporter.

1. Section 4536 of our Code provides, that all exceptions which go merely to the form of an indictment, shall be made before trial. The *residence* of the defendant is not a material allegation. Its statement is mere matter of form. In practice, it is never proven before the jury. If omitted, and objection is made, it is too late to make it after arraignment and plea. Code, sec. 4536.

2. In looking through the record in this case, whilst we cannot affirmatively say we approve of the refusal of the Court to grant the motion of the defendant to continue, yet, on the other hand, we are unable to say that we disapprove it. The Circuit Judge has large discretion in continuances. The application is, to a great extent *ex parte*, at least it is the practice, to hear no counter showing, and there are often circumstances, in the actual surroundings, of which none but the Court below can be a proper judge. This Court will not interfere, unless the Judge abuses the discretion reposed in him by law. It is only then he is in error. Continuances are in the wise discretion of the *Superior Court*, not of this Court, and it is only when the discretion of the Circuit

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is abused—is unwise—that this Court interposes to
 ol it.

it be true that the defendant did not know the case was
 ved to Bartow county until the brief period before the
 which he fixes, we confess that it would seem he had
 ime to prepare his case. But here was the record star-
 im and the Court in the face that the case had been
 ed at his own instance by an order, at April Term, 1868,
 ordon Court to Bartow county. November Term, 1868,
 artow Superior Court, gave over six months time for
 aration. It was his business to know, and as he makes
 xplanation of his ignorance, we take it for granted that
 is inexcusable. If a man shut his eyes to facts patent
 plain, he must take the consequences.

That the defendant was in jail in a distant county, is
 egal excuse for want of preparation. If this is an excuse
 an never be tried at all. The State keeps him secure.
 t it has a right to do, but we all know if he uses proper
 ence he can have his case prepared, even though in jail.
 knows his witnesses, and has the State's officers and sub-
 as at his command. *Revel vs. The State*, 26th Ga., 278.

No excuse is given for the absence of counsel. It
 ld be trifling with public justice to hold back her hand
 use the accused's lawyer saw fit to absent himself from
 Court. 16th Ga. R., 526.

Whilst we recognize the soundness of the argument,
 justice is the ultimate end of the rules of proceedings,
 it is true, that to a large extent, rules of proceedings are
 ortant towards the attainment of justice. Even in a case
 ife and death the Court must proceed by rule, and not in
 ision. A pertinacious and suggestive advocate can have
 umber of after-thoughts, and suggest indefinitely new
 rs of motions made and decided, until the time fixed by
 for the term is exhausted. The rule of Court is impera-
 . . . "All grounds of motion for non-suit, in arrest of
 gment, and for *continuance*, etc., must be urged and in-
 d on at once. And after a decision upon one or more
 nds, no others afterwards urged will be heard by the

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Court." 53 Com. L. Rules. In practice, this rule is of *in the discretion of the Court*, relaxed, but we are strongly inclined to think that more business would be done, far more wisely, if it were strictly adhered to.

6. As we have said, a motion to continue is in *ex parte*, and the Court below not only has a right, but his duty to scan closely the very words of the affidavit, pared carefully, as it is, by counsel, and to judge of it in light of all the circumstances. Here was a most atrocious crime, a good citizen, shot down wilfully, without the provocation, at his own door, by a drunken outlaw. I were present in Court four persons, at least, who stood and saw it done. And yet, because the prisoner swears there were others present and saw the deed done, though has not conversed with them and can not say what I will testify, except from his own knowledge of what place—he at the same time setting up insanity and mental aberration at the time—the Court is charged to have been in refusing to continue.

We think it will be pushing caution too far to overrule the Judge in such a case.

We cannot, in looking through this record, escape the conclusion, that this motion to continue was made as an *œuvre de finesse*, and not for the purpose of getting the trial continued. We repeat, that the refusal of a continuance is in the sound legal discretion of the Superior Court, and not of this Court, and, to make the refusal of the Circuit Judge to grant a continuance a ground of error, it must be made appear affirmatively, that the Court below has abused his discretion. We do not mean that he has acted wickedly or with unnecessary harshness, though, as a matter of course, that would be abuse, that he has *clearly* erred—done the party, perhaps in a grossly, and positively, injustice.

This is not a Court of appeals, but of errors, and on matters left by law in the sound discretion of the Court below. It is not enough, simply, that this Court would, so far as the case is before it, have done otherwise, but it must affirmatively appear, that on the whole case, the Judge was clearly

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, before this Court has jurisdiction of an error of dis-
n. *Roberts vs. The State*, 14 Ga. R., 6; *Revel vs. The*
26 Ga. R., 493; 27 Ga. R., 411.

If the prisoner was insane at the commission of the
e is not guilty; he may prove his condition under that

It is, in all crimes, one of the ingredients of the
e that there shall be a joint operation of act and intent,
an insane person cannot, in a legal sense, have any

Indeed, in murder, soundness of mind, in the per-
ion of the act, is a part of the definition of the crime.
in see no necessity, in such a case, for the special pro-

for a "plea of insanity" and its trial by a "special

The section of the Code, by virtue of which it is
rded that even insanity at the time of the act is to be
separately from the plea of not guilty, and by a special
is as follows:

Whenever the plea of insanity is filed, it shall be the
of the Court to cause the issue on that plea to be first
by a special jury, and if found to be true, the Court
order the defendant to be delivered to *the superintendent*
asylum, there to remain until discharged by the General
ably."

seems to us both absurd and cruel to send a sane man
lunatic asylum, and we can not think such was the
of the law makers.

ere may perhaps be a propriety in so confining one sub-
fits of insanity. Such a person may fairly be con-
d dangerous to the community, but that one perfectly
at the time of the trial, free from the insanity which
not made him irresponsible for his acts; should be con-
ed by the law to live among madmen, is to us so pre-
ous, that we can not think such was the intention of
egislature.

is true there is other sections of the Code which seems
ply that this section is to be so understood, (section
) but it is hardly fair to insist that every section of so
a body of laws shall be absolutely harmonious.

are inclined to think the case of a man who is subject

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to frequent fits of insanity, and in one of them has committed a crime, (and in fact such cases are those with which, in practice, we most frequently have to deal,) might come under the law. Such a person may have lucid intervals, but not unfairly may be called insane, and in such cases it may be both mercy to him, and policy in the public, to confine him, but unless it be pleaded that he is insane, at the trial, or he be one of the unfortunate class alluded to, subject to fits of insanity, so as to constitute that condition a characteristic one, we are of the opinion that his plea of insanity is part of his plea of "not guilty," and that he is not subject, if his plea of insanity be sustained, to be consigned to the lunatic asylum. He may, and must prove the facts on his trial, and if they show him to have been insane at the time of the act, he is "not guilty."

We do not decide that if his plea show not only that he was insane at the time, but that he is subject to fits of insanity, so that he may not inaptly be called an insane man, he is not entitled to the privilege of the special plea and special trial provided for by this section of the Code. This is not such a case.

That the defendant was insane at the time of the act done, is, in fact, but a branch of the plea of not guilty. If it be true, he has committed no offence, and we see no hardship on him that the Judge, who had pursued the express language of the Code, required him to plead guilty or not guilty on his arraignment. If he saw fit, as one shape of his plea of not guilty, to plead specially his insanity, which he was not bound to do, his plea of not guilty did not interfere. When neither party introduced evidence under the plea, it was right in the Court to withdraw it, and discharge the special jury.

8. The Judge was asked to charge the jury that, if from *any cause* they had doubts of the guilt of the prisoner they must acquit him. The Judge refused so to do, and charged that if they had any reasonable doubts which arose from or grew out of the testimony in the case, they must acquit, saying to the jury that doubts "*from any cause*" were too sweeping. We think the Judge was right. The doubts

must be doubts pertinent to the matter in issue, arising out of the evidence, or want of evidence, and not from *any cause*. Jurors, in their judgments in criminal cases, occupy the same position as other searchers after truth, with but one exception, the presumption is in favor of innocence, and the guilt of the defendant must not be doubtful. But the rules of law and the grounds of confidence are the same as in other cases, and the principles of common sense are just as controlling as in other cases. No morbid sensibility, no skeptical niceties, are to control them, but the plain rules of common sense and common experience.

9. Section 4257 of the Code prescribes that "the penalty for murder shall be death, but may be confinement in the penitentiary for life in the following cases.

"1st. By sentence of the presiding Judge, if the conviction is founded solely on circumstantial testimony, or if the jury trying the traverse shall so recommend. In the former case it is discretionary with the Judge, in the latter it is not."

"2d. By Act of the General Assembly."

In the construction of the Code, the object of the Legislature is to be kept in view. Without doubt that object was not to make new laws, but to codify and make plain the laws already in existence. It is true that in many instances the compilers have altered the law, and until the Convention of 1865 adopted the Code bodily, there was among the profession some doubts as to the validity of these alterations. Keeping, then, in view the object in the appointment of the compilers, it is but a fair rule of construction to presume that they did not alter the law, except where they have plainly done so, and only so far as they have plainly done so.

The law, before the Code, made the punishment of murder death, except in the single case of a conviction founded solely on circumstantial evidence. In that case, in consequence of the extreme liability of such testimony to deceive, the Judge was authorized, in his discretion, to sentence the convicted person to imprisonment for life.

This was in the discretion of the Judge; the recommendation of the jury had nothing to do with it, except by its

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moral influence. And this was felt to be an evil. Judges sometimes inflicted the death penalty, even in cases of circumstantial testimony. Public opinion has always, in this State, been against the death penalty, in cases of this kind, but in other cases of plain, direct evidence, that mawkish mercy, which hesitates to deal out death to the guilty manslayer, has never had, in this State, much currency. We are inclined against a construction, which assumes the codifiers, without any public demand for the alteration, to have intended to introduce so vital a change into our criminal law.

We do not, therefore, accede to the construction which the Court below has put upon the Code, to-wit: That in all cases of murder, it is the right of the jury, if they have any good reason, to authoritatively recommend, in lieu of the death penalty, imprisonment for life. We think the old law, and especially the retaining in the section, the case of "conviction, on circumstantial evidence," are a key to the proper construction of this section of the Code. The death penalty is prescribed, except in cases of circumstantial evidence.

As we understand the language of the Code, it does not authorize the death penalty to be commuted in all cases by the mandatory recommendation of the jury. The punishment of murder is still death by the law, except in cases of circumstantial evidence. If the conviction is founded solely on such evidence the jury may recommend such commutation, and their recommendation is mandatory and final. If they fail so to recommend, it is still in the discretion of the Judge so to commute. But neither the Judge nor the jury have power to commute the death penalty to imprisonment for life, except in cases where the conviction is founded solely on circumstantial testimony. To give the words of the Code any other meaning would, it seems to us, be to stretch the language of the codifiers contrary to the intent of their appointment. It will be noticed, too, that unless the clause "if the jury so recommend," is confined to the case of conviction founded on circumstantial evidence, we will be driven to the absurd result that in such cases the fate of the prisoner is wholly

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mer case, it is said, it is discre-
ter it is not. What is the
founded solely on cir-
that the language of
by understanding
the jury a mandatory
iction founded solely on
ney failed to exercise that
ion to the Court. Otherwise,
the remarkable conclusion that
ses, authoritatively recommend the
ne discretion of the Judge could only
single case of a conviction founded solely
al evidence. The division of the section im-
ter the words "following cases" into para-
arked 1 and 2, in the first of which is included
e "case" the language we have quoted, and in the
the words "By Act of the Legislature," indicates that
the whole section included in paragraph 1 is a *case* in
the sense intended, by the words *following cases*, in the
second line.

The Judge, in this case, gave the prisoner a more favor-
able charge in this point than, as we have held, he was
entitled to. He told them that they might, if they could
find any palliating circumstances, recommend the commu-
tation. If the qualification be wrong, it did the prisoner
no harm, as such recommendation was not in the power of
the jury. This was a plain case of murder—wicked, reck-
less, causeless murder—and the proof positive and direct.
If ever a jury was right this one was. Mercy, in such a
case, would be cruelty to society. Violence and homicide
have too long been the reproach of our State. And whilst
we would always insist on a strict adherence to the law, yet
we have no fancy for refinements, to clutch from his merited
fate one so lost to all care for human life, as is exhibited by
the facts of this record. Too many crimes remain, in this
State, unpunished; too many criminals go unpunished of jus-
tice, until our brother's blood cries out, as did Abel's. Hu-

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man life, peaceful human life, needs for its protection, that the laws against murder shall be enforced, and we can not, for slight causes, delay the march of punitive justice.

Judgment affirmed.

T. H. KILGO, plaintiff in error, vs. R. J. CASTLEBERRY,
defendant in error.

1. When an attachment is levied on real estate, and, before judgment on the attachment, an execution on a common law judgment, in favor of other parties, against the defendant is levied on said real estate, the sheriff may sell under the last levy and the purchaser gets a good title.
2. When an execution against two joint obligors is levied upon the property of one of them, the other defendant has a right to buy the property at the sale, and he gets the full title of his co-defendant to the property.
3. Mere general charges of fraud, without specification of fraudulent acts, are not sufficient to give a Court of Equity jurisdiction to set aside a sheriff's sale.
4. When a *fi. fa.* against two joint obligors, mutually interested in the consideration, is satisfied by the sale of the property of one of them, the other is indebted to him for contribution according to the equitable rights of the two in the original contract, and the creditors of the obligor whose property has been sold, may reach this obligation to contribute, by process of garnishment, and have, therefore, a remedy at law.

Equity Contribution, etc. Decided by Judge IRWIN.
Lumpkin Superior Court. May Term, 1868.

Kilgo sued out an attachment against Benjamin F. Castleberry, as a non-resident, for \$50 00, and had the same levied on certain lots of land in said county. He obtained judgment therefor, on the 6th of August, 1866. Pending this attachment, one Francis H. Stork, administratrix, obtained a common law judgment against said Benjamin F. Castleberry and Richard J. Castleberry, (his brother,) upon their joint obligation, had a *fi. fa.* issued thereupon, and levied on said lots of land as the property of the said Benjamin F. The

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lands were sold under said *fi. fa.*, by the sheriff, and said Richard J. Castleberry bought the lands for \$165 00, and went into possession of them. Afterwards the attachment *i. fa.* was levied on the said lands as the property of said Benjamin F., the same were sold by the sheriff, and Kilgo bid them off for \$60 00; but Richard J. Castleberry would not give possession to Kilgo.

Thereupon Kilgo filed his bill in equity, stating said facts, and that the lands were worth \$5,000 00 because of supposed minerals therein, that this purchase by Richard J., was with notice of the levy of said attachment and was a fraud upon Kilgo as a creditor of said Benjamin F., and was intended to defeat him in the collection of his said debt, that he had offered to relinquish all his claims, if Richard J., would pay off the attachment *fi. fa.*, but he would not pay it, that said sale to Richard J. was obtained by fraud or collusion by said Richard J. and Benjamin F., to defeat said Kilgo, and the price paid for it was wholly inadequate, the annual rental of the land being worth \$200 00.

This bill was demurred to upon the ground that it contained no equity, etc. The Chancellor sustained the demurrer and dismissed the bill. This is assigned as error.

WEIR BOYD, WIMPY, for plaintiff in error.

W. P. PRICE, for defendant in error.

McCAY, J.

1. The entry on an attachment of the levy upon land, does not create a lien, as against a judgment obtained before judgment on the attachment. There was, therefore, no reason why the common law judgment should not sell the property. Our attachments are only *quasi* proceedings *in rem*, so that the land can in no proper sense have been locked up by the first levy. In practice, there is fact no seizure of land by a levy in this State. Nothing is done but the entry and notice to the tenant.

2. Why might not R. J. Castleberry buy at the sale?

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Public policy would rather promote than forbid, bidding, and Mr. Castleberry was interested in having the land bring at least enough to pay the *fi. fa.* That he was one of the co-defendants, does not, to our minds, affect his right to bid. So far as the validity of the sale is concerned, we do not see but that the defendant, as whose property the land was sold, might have bid, and if the highest bidder, have been the purchaser. There is no charge that the sale was not duly advertised. Why was not Kilgo present, and himself a bidder?

3. It is true there is a charge in the bill, of fraud, but it is a mere general charge, and states no facts. Equity will not interfere, without some specific allegation of facts, which the Court may pronounce fraud.

4. If the sale was illegal, complainant has a remedy at law. In every view of it we think the Judge was right.

If it be true that this *fi. fa.* selling the land was a joint debt, both defendants equally interested in the consideration, or if R. J. Castleberry was the principal, we will not say that the complainant may not have his remedy by garnishment. In that case, Benjamin F. Castleberry's land having paid the whole debt, R. J. Castleberry would have been indebted to Benjamin so much for money paid to his use.

Judgment affirmed.

WILLIAM WATKINS, plaintiff in error, vs. JOHN D. POPE,
defendant in error,

(BROWN, C. J., having been of counsel in this case, did not preside in it.)

When A. sold to B. a stock of merchandize in consideration that B. would pay a certain debt of \$500 due by A., to which B. was security, and in further consideration that B. would pay the debts due by A. for the stock of goods, which amounted to \$1,500 :

Held, That the *mode* of payment was a part of the consideration, and that even as to the \$1,500 A. has no right of action against B. until he fails or unreasonably delays to pay the debts due by A. for the stock of goods.

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Nor can a general creditor of A., in the absence of any fraud or collusion between parties, with intent to hinder or defraud the creditors of A., subject by the process of garnishment, this obligation of B. to the payment of the debt the creditor holds against A. In such a case A.'s general creditors may, by garnishment, place themselves in A.'s place, with all his rights against B., with the additional advantage that they are not estopped by A.'s own fraud, if there be any, and if B. has refused, or unreasonably delayed to pay the stock-debts, or has failed to perform his contract with A., they may recover.

Attachment and garnishment. Before Judge PARROTT, Fulton Superior Court. October Term, 1868.

Pope sued out attachment against E. H. Williams, and had Watkins garnisheed, on the 30th of March, 1867. Pope afterwards had judgment against Williams. Watkins answered, denying that he owed Williams, or had any of his property. This answer was traversed.

It was agreed that this issue should be decided by Judge Parrott, (presiding for Judge Pope, the plaintiff,) and that a verdict should be taken under his direction.

The other facts submitted to Judge Parrott, as agreed upon by counsel, were these: On the 23d of March, 1867, said Williams and Watkins entered into a written contract as follows:

"GEORGIA, FULTON COUNTY:

Contract this day made and entered into between E. H. Williams, of the one part, and William Watkins, of the other part, both of said State and county: Witnesseth, that I, the said Williams have this day sold and delivered to the said Watkins my entire interest in stock of jewelry now in the store, known as the Crystal Palace, consisting of watches, clocks, plated ware, show-cases, and a general assortment of jewelry, together with my interest in said Crystal Palace building, and in consideration that he, the said Watkins, pay off and discharge all the debts of said concern now owing for the stock, which amounts to the sum of \$1500 00, and which he, the said Watkins, obligates himself to pay, and also for and in consideration of the further sum of \$500 00, which I

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owe for borrowed money, to William Solomon, and for which he, the said Watkins, is security, which said sum of money he, the said Watkins, this day obligates himself to pay.

In testimony whereof I set my hand and seal.

E. H. WILLIAMS.

Signed and delivered, this 23d day of March, 1867, in presence of

Mr. L. GILBERT, witness,

C. M. FRAZIER, “

ROBERT POWELL, “ ”

The northern creditors referred to in said agreement knew nothing of said contract previous to the making of it, not until after the garnishment was served. It did not appear, by the agreed facts, who these creditors were, whether there were any such, or that if any, they have as yet heard anything of the contract.

Under this state of facts, the Judge directed a verdict against Watkins for the amount due on the said judgment against Williams.

This decision is assigned as error.

HAMMOND, MYNATT and WELBORN, for plaintiff in error, said this was an absolute sale to Watkins, and cited Code of Georgia, sections 3226 and 3485, as to garnishment, and *Hoskins, Huskill & Co., vs. Johnson & Garrett*, 24 Ga. R., 628, *Cock vs. Walthal*, 20 Ala. R., 334; *Roley vs. Labergan*, 21 Ala. R., 60. Creditors' assent would be presumed. *De Forrest vs. Bacon, et al.*, 2 Conn. R., 633; *Brooks vs. Marbury*, 11 Wheaton R., 78. There is sufficient certainty as to these creditors. 2 Parsons on Con., 561; *McWhorter vs. Wright, Nichols & Co.*, 5 Ga. R., 555. Williams could not make Watkins re-pay him. *Pike vs. Brown*, 7 Cush. R., 133. Those creditors alone can sue Watkins. *Whitehead vs. Peck*, 1 Kelly, (Ga. R.,) 147; *Fulton vs. Dickinson*, 10 Mass. R., 290; *Cabot vs. Haskins*, 3 Peck R., 91; *Hale vs. Marston*, 17 Mass., 575.

CLARK & LOCHRANE and J. D. POPE, for defendant in or, furnished no brief to the Reporter.

MCCAY, J.

The written contract between Williams and Watkins reveals following transaction :

Williams sells to Watkins a certain "stock" of goods in store-house in Atlanta, and Watkins agrees to pay for them paying a certain debt of \$500 to William Solomon, due Williams, to which Watkins was security; second, by paying the debts Williams owed for the "stock," estimated \$1,500.

Within ten days after this sale, Mr. Pope garnishees Watkins, and it is contended that he is entitled to a judgment on ground that Watkins is indebted to Williams \$1,500 00. I think not.

The mode of payment was evidently one of the considerations in the sale. Watkins has a right by his contract to pay in a particular manner. As to the \$500 00, it is admitted that he might have the very strongest reasons to pay that rather than cash. But we can easily see why, with the best intentions, as he was himself about to embark into business, perhaps deal with these very stock creditors, he should postpone for the payment of the debts due them. It does not appear that these debts were all due at the time, and it might be that he hoped to get some indulgence on them. At all events, that was his contract, and until he breaks it neither Williams nor his creditors can complain. There being no time fixed within which this payment was to be made, we think he had a reasonable time, considering the distance and number of the debts.

If, within a reasonable time, he has failed or refused to pay these debts, or to have himself substituted for Williams, as to relieve Williams entirely, then he has broken his contract, and Williams, or his creditors, may proceed against him.

We do not think this is a novation under the Code, section

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2682, for there was clearly no assent of any of the creditors, much less an agreement on their part to look to Watkins, and this is necessary to constitute a novation. Code, section 2682.

Nor is it an assignment in trust for the benefit of these creditors, which the Court will presume they will assent to, because it is for their benefit. It does not pretend to be an assignment. It is a simple sale, the consideration of which is the payment by Watkins of certain debts due by Williams.

Nor is it a deposit, by Williams, with direction for its application, and subject therefore to revocation. If this were so, the case of *Howard College vs. Pace*, 15th Ga., 486, would be a strong authority for the plaintiff in the garnishment.

If it appeared that there was in this transaction any fraud, any attempt to hinder or delay the creditors of Williams, or any collusion between Watkins and him, for his (Williams) benefit, that would give an entirely new aspect to the case. Watkins, it is plain, has got the effects of Williams, but if he has them for any fraudulent purpose against the creditors, he can be made chargeable by them, or any of them.

These particular creditors, to-wit: the stock creditors, have no special interest in this transaction until they assent to it, and release Williams.

If, therefore, there is any collusion or arrangement between Williams and Watkins to hinder or defraud Williams' creditors, by this mode of payment, nominally agreed upon, any creditor may interfere. He would have every right of Williams, and the additional advantage, that he might set up Williams' fraud, which *he* could not do. We repeat, however, if there is no fraud, Watkins had a *right to his contract*. If he refuses, or, after a reasonable time, fails to comply, a right of action arises in Williams, and therefore, in his creditors.

Judgment reversed.

Southern Express Company vs. Shea.

SOUTHERN EXPRESS COMPANY, plaintiff in error, vs. **JOHN L. SHEA**, defendant in error.

As a common carrier receives and receipts for goods, to be transported beyond the terminus of his own line, he undertakes to transport the goods to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line, he will be liable therefor.

In an express contract was made between the plaintiff and the Adams Express Company for the transportation of goods from New York to Macon, Georgia, and the goods were lost when in the possession of the Southern Express Company, as the agents of the former company, to complete the transportation under the original contract of bailment:

That the plaintiff's right of action, for the loss of the goods, was against the Adams Express Company, with which he made the contract for the safe transportation of the goods to the point of destination, and not against the Southern Express Company.

Verdict against a carrier. Charge of the Court. By Judge
Macon Superior Court. May Term, 1868.

Shea brought case against the Southern Express Company, averring in one count, that on the 3d of November, 1865, delivered to said Company, as a common carrier, at Savannah, for transportation to Macon, four packages of goods, valued at \$7,000 00, which, by the fraud, negligence and carelessness of said Company, were wholly lost; and in another count, averring the same things with this variation: that the Southern Express Company is known as the Adams Express Company, in New York, and that the said goods were delivered to it in New York. The general issue was pleaded. At the trial, the plaintiff read in evidence a printed receipt, as follows:

“ ADAMS EXPRESS COMPANY,
Great Eastern, Western, Southern Forwarders, No. 1.
NEW YORK, October 27, 1865.

Received of McGrath & Hunt two (2) cases merchandise, value ———, consigned to J. L. Shea, Macon, Ga., which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and not to be delivered to other parties to complete the transportation. . . .
As part of the consideration of this contract, and it is agreed, that

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the said Express Company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be, by said Express Company entrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same may be proved to have occurred from the fraud or gross negligence of said Express Company, or in their servants; nor in any event shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or *unless especially insured by them, and so specified in this receipt*, which insurance shall constitute the limit of the liability of the Adams Express Company. *And if the same is entrusted or delivered to any other Express Company or agent, (which said Adams Express Company are hereby authorized to do,) such Company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable, and the Adams Express Company shall not be, in any event, responsible for the negligence or non-performance of any such Company or person; nor in any event shall said Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing, at this office, within thirty days after this date, in a statement to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the Company shall not be held responsible for damage to goods not properly packed and secured for transportation. It is further agreed, that said Company shall not, in any event, be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection or riot, or the dangers incident to a time of war.*

For the Company.

BROWN.

Freight _____."

It was admitted by defendant that the Adams Express Company, at New York, had issued and delivered to the plaintiff, or his agents, receipts exactly like that for all the goods sued for.

Plaintiff then read in evidence the answers of E. P. Turison, who testified as follows: In the latter part of October, 1865, he was agent of the Southern Express Company, and also of the Adams Express Company, at Savannah, Georgia. His agency of the Adams Express Company was independent of his agency of the Southern Express Company. In the latter part of 1865, he received, from a New York steamer, four boxes, one bale, and one bundle, marked "J. L. Shea,

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on, Ga." He shipped these goods on board the steamer Savannah, plying between Savannah and Augusta, which was in the Savannah river on the 5th of November, 1865. It was admitted that all of Shea's goods were on the Savannah when she sunk.) Of Shea's goods, one box and one bundle of wadding was recovered. The box was delivered at Savannah, the bundle was thrown away as worth-

the witness, received said packages (from the New York agent) from the Adams Express Company, as its agent at Savannah, and shipped them as agent of the Southern Express Company, on said steamer Savannah, to Augusta. In receiving the goods, as agent of the Southern Express Company, from the Adams Express Company, he gave no receipt, because the contract between the two companies did not require such receipt. He acted in the matter as agent of both companies, with full knowledge of the contract between the companies, and received the goods under said contract. If he had given any receipt, it would have been the same as if given to the public at that time. (For which see *ante*.) The plaintiff also read in evidence a circular letter, sent by the witness to Shea, as follows:

"SOUTHERN EXPRESS COMPANY, EXPRESS FORWARDERS, }
SAVANNAH, February, 13, 1866. }

: For the purpose of ascertaining if any of your goods were saved from the steamer Savannah, sunk on the Savannah river, on her voyage to Augusta, November 5, 1865, and not being identified, were sold by the crew of said steamer at auction, we request that you forward us your list of said shipment, 4 Nov., '65, as per our manifest we find Shea, 4 boxes, to your address.

Yours, respectfully,

E. P. TUNISON,
Agent Southern Express Company.

J. SHEA, Esq., Macon."

They also read said contract alluded to by said witness, as follows:

THIS AGREEMENT, made this the third day of October, 1865, by and between the Adams Express Company, a joint stock association, organized pursuant to the statutes of the State of New York, of the first part,

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and the Southern Express Company, a corporation duly organized under the laws of the State of Georgia, of the second part, witnesseth: Whereas, the parties hereto have agreed upon a division of their territorial rights, as Express Companies, within and throughout the United States; and whereas, the more completely to carry out the intent and spirit of the said agreement, and to provide for the profitable conduct of the express business thereunder, it is necessary to define the mutual obligations of the parties thereto, it is therefore agreed: First. That the Adams Express Company will deliver to the said, the Southern Express Company, for the completion of the transportation, all goods, wares and merchandize, and other property, which the said Adams Express Company may receive of any of its offices for inland transportation to any point south of the Ohio river and west of Richmond, Virginia, saving and excepting to points on the Louisville and Nashville Railroad and its branches, and the railroad running to Lexington, Kentucky, with their connections as they now exist, on the Baltimore and Ohio Railroad and its branches, on the Alexandria and Orange Railroad, and on the Virginia Central Railroad, and also to make like delivery, for a like purpose, of all property received by the said Adams Express Company, and destined to points west of the Mississippi river, and south of a line drawn due west from Cairo, Illinois. Second. The said Southern Express Company hereby agrees to deliver to the said, the Adams Express Company, for the completion of the transportation, all goods, wares and merchandise, and other property, received by the said, the Southern Express Company at any of its offices, and destined to points within the territory of the said, the Adams' Express Company, as the same is now occupied by them, and is more precisely defined in the said agreement. Third. That all goods, wares and merchandize, and other property delivered by the said, the Adams Express Company, to the said, the Southern Express Company, shall be received by the latter Company upon the same terms and conditions as are expressed in the printed receipts used and issued by it, upon the receipt of similar shipments from the public generally, and upon no other terms and conditions, and that no other or greater liability shall attach to the said Southern Express Company, upon the delivery to it of any such property, than such as arises under such printed receipts, and this stipulation shall take effect upon each delivery of property thereunder in like manner as if one of such printed receipts had been issued to the said, the Adams Express Company, on such delivery. Fourth. That all goods, wares and merchandise, and other property delivered by the said, the Southern Express Company, to the said, the Adams Express Company, shall be received by the latter company upon the same terms and conditions as are expressed in the printed receipts used and issued by it upon the receipt of a similar shipment from the public generally, and upon no other terms and conditions, and that no greater liability shall attach to the said Adams Express Company, upon the delivery to it of any such property, than such as arises under such printed receipts, and

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pulation shall take effect upon each delivery of property herein like manner as if one of such printed receipts had been issued said Southern Express Company on such delivery. Fifth. The "printed receipts," as herein used, shall include the forms now by the said two companies, and any subsequent modification which either company may adopt. The terms and time of settlement between the two companies shall remain as heretofore agreed. In witness whereof the said companies have caused this agreement to be signed by their respective Presidents the day and year above

ADAMS EXPRESS COMPANY, [L. S.]

By W. B. DIXMORE, President.

SOUTHERN EXPRESS COMPANY, [L. S.]

By H. B. PLANT, President.

and delivered in presence of—

B. BARNUM,
and W. TILLEY."

The plaintiff also read in evidence an agreed statement of facts, as follows:

The amount in value of goods, as shown by the invoices received, (\$6,250 86,) was delivered to the Adams Express Company, in New York City, on the 26th of October, 1865, consigned to J. L. Shea, Macon, Ga., as his property, and the Adams Express Company thereby undertook to deliver the goods to said John L. Shea, Macon, Georgia, within a reasonable time; said goods were never delivered. If they had been delivered they would have been worth in Macon, Georgia, ———— *per centum* advance on said invoice prices. Further, it is admitted and agreed that said goods were forwarded by the Adams Express Company, by sea, to Savannah, Georgia, and thence forwarded *via* Savannah river, on a steamer Savannah, and that said steamer was lost about thirty miles above Savannah, on the 5th of November, 1865, and the goods were then and there lost. Whether the goods were shipped from Savannah on said steamer, by the Adams Express Company or the Southern Express Company, is to be determined by the evidence in the case.

The steamer was lost under the following circumstances: The steamer was tied up about thirty-five miles above Savannah,

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when she was run into by another steamer coming down the river, and sunk."

It was understood that it was not admitted that the Adams Express Company undertook to deliver the goods in Macon; that much of the foregoing admission went for naught.

Shea testified that the goods were worth fifty *per centum* upon the invoice prices, and that the box which he got from the wreck he took at \$150 00. Two other witnesses put the value in Macon at fifty and seventy-five *per cent.* on the invoice prices, respectively, and all agreed that the Express freights at the time was about \$7 00 per hundred.

The defendant's attorneys offered no testimony. They requested the Court to charge the jury as follows:

1st. If they believe, from the evidence, that, the Adams Express Company and the Southern Express Company had, before the shipment of the goods by the Adams Express Company, entered into a contract, which at the time of the shipment was subsisting, that they should not be liable for the loss of goods delivered by one of these companies to the other for transportation, at the *terminus* of their respective lines, by *fire* or *water*, and that the Adams Express Company delivered the goods in this case to the Southern Express Company, at Savannah, as the agents of the plaintiff, then the plaintiff is not entitled to recover.

2d. If, from the evidence, they believe said goods were delivered by plaintiff to the Adams Express Company in New York, and consigned to the plaintiff at Macon, Georgia, and were received by the Southern Express Company, at Savannah, from the Adams Express Company, to be by the Southern Express Company forwarded to Macon, Georgia, then said Adams Express Company acted as the agent of plaintiff in delivering the goods to the Southern Express Company, and are alone liable to the plaintiff for the loss of the goods, and as a consequence the Southern Express Company is not liable to the plaintiff for such loss.

The Court refused so to charge, and on the contrary charged that the Southern Express Company was liable to the plaintiff in this case, as a common carrier, and that the Southern

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press Company was liable to the plaintiff, no matter how received said goods at Savannah, even if they had, as common carriers, picked them up in the streets.

The jury found for the plaintiff \$9,200 64, with interest costs.

Defendant's attorney moved for a new trial upon the grounds that the verdict was strongly and decidedly against weight of the evidence, and because the Court erred both in refusing to charge as requested, and in charging as he

The new trial was refused, and this is assigned as error on the grounds aforesaid.

MR. JUSTICE, DOUGHERTY, for plaintiff in error, said a common carrier may, by special contract, limit its liability. Irwin's case, section 2042; 6th Howard's R., 367, and authorities cited. 19th Ga. R., 203; 21st Ga. R., 526; 28th Ga. R., 543. There was such a special acceptance here. Perils of river trade collision of vessels not caused by negligence. Story R., 512-514; 3 Esp. R., 67; Abbot on Shipping, sections 2 and 5; 4 Taunton R., 126; 2 Wend. R., 190. The presumption of negligence, if any, is against the vessel under

Abbot on Shipping, 330, note 1; Davies' R., 359; 10 Howard's U. S. R., 586. As to who has the burden of proof of negligence. *Berry et al., vs. Cooper and Boykin*, 28th Ga. R., ante. Chitty on Con., t. p., 212 and note; 3 Monf. R., 239; Peck, 270; 2 Baily S. C. R., 177 and 421; 4 Abbott, 168 and 180; 4 Binney, 127; 2 Watts, 114, 8 do.; 1 Conn. R., 487; 3 Mass. R., 481; Sm. L. Cases, 318; Howard's U. S. R., 273. As to express contract, they cited, 21st Ga. R., 541, 2, 3, and 36th Ga. R., 532; Irwin's case, sections 2718, 2719, 2720. If the contract between companies is not an express one to shield the defendant, the Adams' is not shielded by its receipt and it is liable to Shea, for it was bound to deliver beyond its terminus, unless relieved by express contract. 8 M. and W. R., 421; 1 L. and Eq. R., 497; 5 H. and N. R., 274, 969; note 2. See on Carriers, section 95; 19th Wend. R., 534; 3 Law R., 610; 18 Penn. St. R., 224; 24 Ill. R., 332, 466; 34

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111 R., 389 ; 27 Vt. R., 110 ; 1 Fla. R., 403 ; 9 Barb. R., 317, Am. Law Review, April, 1868, 426 to 442.

LOOHRANE, COBB & JACKSON, BACON & SIMMONS, for defendant in error, replied, no excuse avails but *actus dei* or public enemy. Irwin's Code, section 2040. Liability may not be limited by entry on receipts. Irwin's Code, section 2042, 36th Ga. R., 532, 635. Defendant is common carrier, sections 2039, 2040. 36th Ga. R., 532, 635. The contract between the companies did not bind plaintiff. The Adams Express Company could not bind Shea as his agent. Paly on Agency, 150, 151, 153, 164, 32, *et seq.* Hammond, parties to action, 66 ; 1 Livermore, 94, 107 ; Story on Bail, 5 and 6 ; 3 Ross L. Cases, 212, 235 ; Irwin's Code, 1679, 2168, 2170. If delivery to the Southern Express Company is shown, that is sufficient for plaintiff. Chitty on Con. 312, marg. 140 ; Redfield on Railways, 246. Southern Express Company is liable, doubtful whether Adams Express Company is. Irwin's Code, 205, and Redfield on Railways, 281, *et seq.*

WARNER, J.

The error assigned to the judgment of the Court below, in this case is, the refusal of the Court to grant a new trial upon the several grounds specified in the motion therefor. We shall not consider the various grounds embraced in the motion for a new trial separately, but confine our judgment to the main question made by the record, which must control the case.

It appears from the evidence, that there were two companies, the Adams Express Company, incorporated in the State of New York, and the Southern Express Company, incorporated in the State of Georgia. The action to recover the loss of the goods, is brought by the plaintiff against the Southern Express Company as a common carrier, upon their *implied contract*, and not as *tortfeasors*. The contract for the transportation of the goods, was made by the plaintiff with the Adams Express Company in New York, as appears by the receipt given for the goods, to be transported to Macon, Georgia, the

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point of destination. The goods were lost while in possession of the Southern Express Company, *en route* from New York to Macon, and the question is, which company is liable to the plaintiff as a common carrier, upon the contract for the receipt and safe delivery of the goods at the point of destination. In the case of *Mosher & Co., vs. The Southern Express Company*, (*ante* 37) it was held, that when a common carrier received and receipted for goods, to be carried to a point of destination, *beyond* his own line, he thereby undertook ~~to~~ safely transport the goods to *that point*, either by himself or competent agents, and that, if the goods were lost beyond his own line of carriage, he was liable therefor. The contract in this case was made by the plaintiff with the Adams Express Company in New York, whereby they undertook, as common carriers, safely to deliver the goods at Macon, Georgia, either by themselves or competent agents. If, therefore, the goods were lost *en route* to the place of destination, either whilst in their possession, or that of their authorized agents to complete the transportation, they are liable to the plaintiff therefor on their contract of bailment. This ruling is in accordance with the fundamental principles of the law. "Bailment, to deliver, is a delivery of goods in *trust*, upon a contract expressed, or implied, that the trust shall be *faithfully executed* on the part of the bailee. If money or goods be delivered to a common carrier, to carry from Oxford to London, he is under a contract *in law* to pay, or carry them, to the person appointed." 2nd Bl. Com. 451-2; 3rd Bl. Com. 163. As the decisions of the Courts in this country are conflicting as to the liability of the carrier beyond the terminus of his own route, this Court, in *Mosher & Co., vs. the Southern Express Company*, adopted the English rule upon that question, as being the better, and sounder rule upon *principle*, as well as *practical* convenience to the public.

In the cases of the *Southern Express Company vs. Purcell*, 37th Ga. R., 103; and *Southern Express Company vs. Newby*, 36th Ga. R., 635, this Court held, that under the existing law of this State, a common carrier is liable for the safe delivery of goods entrusted to his care as such, and that in case

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of the loss of the goods, no excuse will avail him unless loss was occasioned by the act of God, or of the public enemies of the State; that he cannot *limit his legal liability* by any notice given, either by publications or by entry of receipts given *for the goods*, or tickets sold, but that he cannot make an express contract *independent of his receipt* and that he is to be governed thereby. There was no contract between the plaintiff and the Southern Express Company, either express or implied, to transport his goods from New York to Macon, or from any *other place* to Macon; indeed, there was no *privity* of contract for the transportation of the plaintiff's goods between himself and the Southern Express Company, whatever, but there was an *express* contract made between the plaintiff, by his agent in New York, with the Southern Express Company, to transport his goods safely from New York to Macon, the place of destination. The plaintiff *trusted* his goods for transportation from New York to Macon to the Adams Express Company by *his contract of carriage* and *not* to the Southern Express Company, and although the goods may have been lost whilst in the possession of the Southern Express Company, as the agents of the Southern Express Company, to complete the transportation to the place of destination, the plaintiff's right of action to recover damages for the loss of the goods is against the company with which he made the contract, the company to which he *trusted* the goods for safe carriage and delivery as a common carrier, to the point of destination.

In view of the facts of this case as presented by the record, we think the Court below erred in its charge to the jury, in saying "that the defendant, the Southern Express Company, is liable to the plaintiff in this case, as a common carrier," and that said company was liable to the plaintiff, no matter where they received said goods at Savannah, even if they were common carriers, picked them up in the streets."

Let the judgment of the Court below be reversed.

BROWN, C. J. . . .

The Adams Express Company had the right to limit its liability to the extent of its territorial limits, or otherwise by 'express contract.' This may be done, in my opinion, by an express stipulation, to that effect, in the *body* of the receipt given by the company, and accepted by the shipper. Such express stipulation in the *body* of the receipt is not the "notice given, either by publication, or by entry on receipts, or tickets sold," which is insufficient, but is one form of "express contract," which is authorized by the Code.

Taking this view of the rights of a common carrier, I think I should hold that the contract contained in this receipt was complied with by the Adams Express Company, on the delivery of the goods at Savannah, which was, at the time, the extent of their territorial limits as stipulated in the receipt, were it not for the former decision of this Court, ruling, that the liability of a common carrier can not be limited in this way. As I am bound, under the Code, by these "unanimous decisions" till changed by the Legislature or by this Court, in the manner directed by the statute, I concur in the judgment rendered in this case.

MCCAY, J. . . .

I concur in the judgment of the Court, but I am not satisfied with the ground on which it is put by the majority of the Court.

It is true, that under the decision of this Court in *Southern Express Company vs. Purcell*, 37th Ga. R., 110, Shea has a right of action against the Adams Express Company on his implied contract with it. But it strikes me that he has also, if he so elects, a right of action against the Southern Express Company. The Adams Express Company was his agent. It may be true that the Adams Express Company had no right, under its contract with Shea, to-wit: under its duties as a common carrier, to turn the goods over for transportation to the Southern Express Company. But the fact is that

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it did do so. It made a contract with the Southern Express Company to transport the goods from Savannah to Macon—and it did this as the agent of Shea, without authority, it is true. But it is a general rule that a person may adopt, *ex post facto*, acts done in his name by another acting without authority. He is not bound to do so. He may sue the actor. But, if he so elect, he may adopt his act and sue on the contract. 13 East., 274; 2 M. and S. 485; 1 Bing. N. C., 198; 2 Strange, 859; 1 Atk., 128; 7 B. and C., 310; 3 B. and Adl., 680; Smith's Mer. Law, 113; Bateman Com. Law, section 455.

It is true, if he do adopt the contract he must take it as he finds it. He cannot separate it into parts. He must repudiate it altogether, or ratify it. 2 Strange, 859. And in *this case* the rule will perhaps be of no benefit to Shea, as the contract of the Adams with the Southern was a special one. But I deem it important that, the principle be preserved. The Express companies are now huge enterprises, and I am not disposed to send our people out of the State for redress, unless that be clearly the law of the case. The practice of these companies is to turn goods over to each other, under contracts which they profess to make as the agents of the owner. Perhaps two-thirds of the goods carried by the Southern Express Company, in this State, have been received and are carried, under such contracts. In my judgment, the owner, though he may have a right to sue the person with whom he made the contract, has also a right, if he so elect, to adopt and ratify the act of his agent and sue the Southern Express Company, not, it is true, on his (the owner's) contract with the Adams, but on the contract which the Adams (his agent) has made with the Southern Express Company. I think, therefore, Shea had a right to sue the Southern Express Company. But the charge of the Court and the verdict are wrong, because the Southern Express Company, in this view of it, was acting under a special contract and is only bound by its terms.

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KEY, JORDAN & COMPANY, plaintiffs in error, vs. ANN
E. LOYAL, *et al.*, defendants in error.

estate in the town of Monticello, was sold at sheriff's sale, as the property of an insolvent debtor. *Held*, that the wife of the defendant *in fa.*, is entitled, under the 2013 and 2017 sections of the Code, to the \$500.00 of the proceeds of the sale, set apart and invested in a home for herself and family, against a pre-existing creditor.

Land was sold under a judgment obtained in 1861, the wife could claim no more of the proceeds as exempt from payment of her husband's debts than was *then* exempt by law. WARNER, J., dissenting.

Exemption Laws. Retroactive Legislation. Decided by
the N. G. FOSTER. Jasper Superior Court. November,
Term, 1867.

Boynton filed a bill against Richard J. Loyal, to enforce vendor's lien. Loyal admitted all the facts necessary to sustain the lien and prayed, that after discharging it the amount allowed to insolvent debtors be set apart for his benefit as allowed by law. In April, 1867, there was a decree entered for by Boynton.

Under this decree, the sheriff sold the land for \$407.41 and above what was sufficient to pay off said vendor's debt.

The wife of Loyal had given notice of her intention to take \$500.00 out of the proceeds for the benefit of herself. The sheriff was ruled. Mrs. Loyal, and Maxey, Jordan & Company, creditors, were made parties, and were at issue as to the disposition of said *surplus*. Maxey, Jordan & Company showed that they obtained a judgment against Richard Loyal, in Jasper Superior Court, on the 28th of October, 1867, for \$430, principal, and \$99.10 for interest to date of judgment, and closed. Mrs. Loyal proved by her husband that he was insolvent, and closed. It was admitted that the *surplus* was the proceeds of a house and lot in Monticello, Georgia, and that Loyal had no other land.

Under this state of facts, the Judge decided that the sheriff should invest all of said *surplus* in a home for Mrs. Loyal

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and her family, and this is assigned as error by Maxey, Jordan & Company.

CHAS. L. JORDAN, W. MAXEY, JNO. R. DYER, by Judge A. REESE, for plaintiff in error, said that there was no question as to retroaction in this cause, for that section second of the Code limited the sections 2013, 2017, which give the \$500 to the wife.

GEORGE T. BARTLETT, for defendant in error.

BROWN, C. J.

The single question presented for our consideration in this case is, can the family of an insolvent debtor legally claim \$500, out of the proceeds of his town property, sold at sheriff's sale, as against a creditor, whose debt existed and was in judgment prior to the adoption of the Code, which raised the amount from \$200, which was allowed the family by Act of 1845, to \$500, which is now allowed by the Code.

It is insisted by counsel for plaintiff in error, that the family is only entitled to \$200, which was the amount exempt by law at the time the contract was made, and that sections 2013 and 2017 of the Revised Code, are qualified by section 2. These sections are as follows:

“SECTION 2013. The following property of every debtor, who is the head of a family, shall be exempt from levy and sale by virtue of *any process whatever*, under the laws of this State; nor shall any valid lien be created thereon, except in the manner hereinafter pointed out, but shall remain for the use and benefit of the family of the debtor: 1. Fifty acres of land; * * or in lieu of the above land, real estate in a city, town or village, not exceeding \$500 in value.”

“SECTION 2017. If the debtor owns town property exceeding in value the sum of five hundred dollars, and it can not be so divided as to give to his family that amount, he may give notice to the officer levying thereon, and when the proceeds of the sale are to be distributed, the Court shall order five hundred dollars of the sum to be invested by some proper

erson, in a home for the family of the debtor, which shall be exempt, as if laid off under this law."

"SECTION 2. This Code shall take effect on the first day of January, 1863. All offences committed prior to that date, shall be tried and punished under existing laws; and all rights, or obligations, or duties acquired or imposed by existing laws, shall remain valid and binding, notwithstanding the repeal or modification of such laws."

A majority of the Court are of opinion that it was not the intention of the legislature to qualify sections 2013 and 2017, as cited above, by section 2 of the Code, and that the same provision made for the family of an insolvent debtor would not be defeated by such a construction.

The language of section 2013 is very broad and sweeping. It declares such property *exempt from levy and sale* by virtue of *any process whatever*, and that it shall *remain* for the use and benefit of the family of the debtor. If the intention had been to exempt the property only as against subsequent creditors, why use the words *exempt from levy and sale by virtue of any process whatever*? Why not have said it should be *exempt from levy and sale*, by virtue of any process, upon debt contracted after this date? Suppose there had been an exemption prior to the adoption of the Code, and it had used the strong expression, "*exempt as against any process whatever*," would any Court, in construing the Code, have been authorized to say that the second section of the Code was intended to qualify this, and destroy all exemption as against debts then in existence? We think not. Then how are we authorized to say, it was intended that no debtor's family would have the increase in the amount, as against pre-existing creditors? We must look to the language used by the legislature, and construe it with reference to the object the law-making power had in view, having regard to the reason and spirit of the Act, and considering the policy of the legislature, which is to be ascertained by reference to other Acts which are *in pari materia*.

Exemption laws, and laws making provision for the support of the families of insolvent, or deceased persons, rest

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upon a wise public policy, looking to the preservation of families, and securing to them that protection which is necessary to the best interest of society, and the well-being of every community. The principle was well expressed by Mr. Justice Johnson in *Ogden vs. Sanders*, 12 Wheat., 283, in the following language: "For it is among the duties of society to enforce the rights of humanity, and both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claims of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency, in relieving him from a hopeless state of prostration in which he would be useless to himself, his family and the country."

There has been a growing disposition in the great popular heart of Georgia, for years past, as shown by her legislation, to enforce the rights of humanity, and preserve the helpless wives and children of improvident or unfortunate husbands, from despondency, by relieving them from helpless prostration. The old rule, which had but little regard for the rights of humanity, when in conflict with the pecuniary interest of creditors, has been modified, and debtors as well as creditors are now, as a class, regarded as worthy the consideration of those who make laws for the regulation of society.

The rule formerly was, that the family of an unfortunate debtor might be deprived of every article of necessity, as well as comfort, to satisfy the debt, and his person might be seized and imprisoned at the will of the creditor. But I am happy to know that these barbarous sentiments of the darker age, are fast giving place to the more benign tenets of forgiveness, charity and humanity, which are inculcated by the divine author of christianity, as cardinal virtues. The legislature has engrafted a more humane system on our statute book, and it is the duty of the Courts to enforce it to the extent of their power. While this is the duty of the legislature and the Courts, it is also the duty of both, to discountenance and suppress, as far as possible, all fraud that may be attempted

e practiced by bad men to the injury of creditors, and to that every right is secured to the creditor, which is compatible with the humanity of our system, the preservation of lies, and the well-being of society.

view of the humane policy established by our legislature for the protection and support of the families of insolvent deceased persons, coming as they do, within the same for the same reasons, we are fully satisfied that it was the intention of the legislature in the adoption of the , to so qualify the sections giving the family of the insolvent \$500 out of the sale of his town property, by the language of the second section, as to defeat the allowance in cases of debts contracted by the insolvent prior to that

we think the *unanimous* decision of this Court, made at term, in the case of *Barron vs. Burny, et al.*, (*ante* 264) establishes a principle that must control this case. Sections 2533 and 2537 of the Revised Code, are intended to carry out the precise object contemplated by sections 2013 and 2017, the protection and support of the family, if needed independently of the rights of creditors. To show that these cases rest upon the same principle, we quote the following provisions of the Code:

SECTION 2530. Among the necessary expenses of administration, and to be *preferred before all other debts*, is the provision for the support of the family, to be ascertained as follows: Upon the death of any person, testate or intestate, leaving an estate, solvent or *insolvent*, and leaving a widow, or a husband and minor child or children, or minor child or children only, it shall be the duty of the Ordinary, on the application of the widow, or the guardian of the child or children, or other person in their behalf, on notice to the representative of the estate, if there is one, and if none, without delay, to appoint five discreet appraisers, and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, in property or money, a sufficiency from the estate for support and maintainance, for the space of twelve

months, from the date of the administration, in case the administration on the estate, to be estimated according to circumstances and standing of the family previous to the death of the testator or intestate, and keeping in view also the necessity of the estate. If there be a widow, the appraiser shall also set apart, for the use of herself and children, a sufficient amount of the household furniture. The property so set apart for the family shall, in no event, be less than the sum of one hundred dollars, and if it shall appear upon just appraisement of the estate, that it does not exceed the value the sum of five hundred dollars, it shall be the duty of the appraisers to set apart the whole of said estate for the support and maintenance of such widow and child or children, or if no surviving widow, to the lawful guardian of such child or children, for their support."

"SECTION 2533. The property so set apart by the appraisers shall vest in the widow and child or children, and if no widow, in such children, share and share alike, and the same shall not be administered as the estate of the deceased husband or father."

"SECTION 2537. When the whole of an estate is set apart as provided in section 2530, the widow may pay so much of and such parts of the debts of the deceased husband as she may think proper, consistently with her means, with the advice and consent of the Ordinary."

By reference to the Act of 23d February, 1850, it will be seen that the allowance for the widow and children, in the estate of the deceased was insolvent, was one hundred dollars. • Cobb's Dig. 297. As is already shown, the Act increases this to five hundred dollars, and gives the appraisers discretion to increase it beyond that amount, and decides that it shall be *preferred before all other debts*. Now, if section 2 of the Code, as above quoted, is to be read in connection with, and, as counsel insisted, as a *proviso* to sections 2013 and 2017, why is it not to be read in a like manner as a *proviso* to sections 2530, 2533 and 2537, which increase the exemption from one hundred to at least five hundred dollars as against all debts, and leave it in the discretion of

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widow, who has the whole estate of the deceased in her possession, when it does not exceed five hundred dollars, whether she will pay one dollar of the indebtedness. We ask, in all cases, how can section 2 be held to limit the exemption to subsequent indebtedness in the one case and not in the other?

In *Barron vs. Burny*, above mentioned, this Court unanimously ruled that "Although under the Code, executors *de tort* can not get credit for any debt they may have paid, yet, if in good faith, they have furnished the widow her husband's support according to her circumstances in life, and this has exhausted the effects they have used, they are not liable except for the excess. The claim of the widow is not a debt, but a special provision allowed by law in preference to any debts or liens held by creditors."

If so, why is not the five hundred dollars set apart from the proceeds of the sale of the town property of the insolvent to purchase a home for his wife and children, a "special provision allowed by law in preference to any debts or liens held by creditors?" We confess we are unable to see the distinction.

But it has been insisted that this construction violates the Constitution, because the Constitution of 1865, which has been superseded by that of 1868, declares that retroactive laws injuriously affecting any right of the citizen, are prohibited.

If this law had been prohibited by that provision of the former Constitution, it would seem that the entire repeal of that Constitution without the repeal of the law, would remove the case of all difficulty growing out of that objection, especially as the provision above quoted is omitted and dropped from the Constitution of 1868.

We are satisfied, however, that the provision of the Code now under consideration, did not violate the Constitution of 1865. As we have already shown, the exemption made by the Code for the benefit of the wife and children of a deceased person, is a *special provision* allowed by law, in preference to any liens or debts held by creditors. As it is of higher

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dignity than the rights of any creditor, and is so held by this Court, its enforcement can not injuriously affect any rights of the creditor. In other words, no creditor has any right to satisfaction out of the estate, till this special provision, this right of humanity, is first satisfied. Therefore no creditor's right is injuriously affected by this Act, construed as the legislature evidently intended it should be. And, as no distinction in principle can be drawn between the case of the family of a deceased person, as provided for by the Code, and the family of an insolvent, whose property is taken and sold by the sheriff, both being alike entitled, on the score of humanity, to some reasonable provision for support, the same rule must apply in this case, which relieves it of all Constitutional objection.

The view which we have taken of the rights of families to support, and of the power of the legislature to provide for their relief, is founded in sound reason, and sustained by high authority.

The late Chief Justice Taney, delivering the opinion of the Supreme Court of the United States, in the case of *Bronson vs. Kinzie*, 1 How., 315, says, "For undoubtedly, a State may regulate, at pleasure, the modes of proceeding in its Courts in relation to *past contracts* as well as future. It may, for example, shorten the period of time within which claims shall be barred by the Statute of Limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to executions on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty according to its own views of policy and humanity. It must reside in every State, to enable it to secure its citizens from unjust and harrassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community."

The Courts of New York have gone so far as to establish

le, that it is not in the power of the husband, or head family, when making a contract prospective in its ter, to waive the right of exemption, so as to charge exempt property with the payment of the debt. This ruled in *Kneetle vs. Newcomb*, 22 N. Y. Reps., 249. In that case the plaintiff inserted in the note, the following condition: "And I hereby waive and relinquish all right of exemption of any property I may have from execution on debt." The property exempt amounted to six hundred dollars in value. After judgment on the note the property was levied on and sold, and the plaintiff, who was the debtor, brought an action of trespass for the taking of the property. The Supreme Court of New York held he was entitled to recover, and that judgment was affirmed in the Court of Appeals by the unanimous judgment of the full bench. The principle is sustained in *Crawford vs. Lockwood*, 9 How., 547. See also *Harper vs. Leal*, 10 How. Pr. R., 1 Kernan R. 266.

The current of legislation, sustained by the Courts, of this State has gone upon the principle contended for in this decision for years past. The amount of property exempt from forced sale has been increased from time to time by various acts of the legislature. The support allowed the family of a deceased has also been enlarged from time to time, and sustained by the Courts. The daily, weekly, and monthly wages of laborers have been exempt from the process of garnishment. Debts due by trustees of different grades, have been declared of higher dignity and given precedence over other debts or liens of creditors that would, but for the enactment, have held precedence. Debts due for rent have been placed on a par with other debts secured in the same manner.

It has been held by this Court at its present session in the case of *The State vs. Dickson*, (*ante* 171), that debts due to the Western and Atlantic Railroad, which is the property of the State, and its incomes part of the revenue of the State, have precedence over debts of older date due an individual, even when the debt was secured by mortgage to the individual, before the debt was contracted; and, that the State is entitled to

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the money raised by the sale of the mortgaged property, though the mortgage existed before the mortgagor was the State's debtor.

The law of imprisonment for debt has been modified from time to time, and our new Constitution abolishes it entirely. But none of the sticklers for the creditor's rights, to have the precise remedies allowed by law when the debt was contracted, claim that it was a violation of the constitutional rights of the creditor to abolish imprisonment for debt. If the State has the right to make these various modifications in her law, affecting the remedies allowed parties litigant, many of which may operate the entire loss of the claims of creditors, which but for such changes in the law might have been secured, why may she not make the one now in question?

Before closing this opinion, we will remark, that this Court is committed to the doctrine that an exemption for the benefit of the family holds good as against creditors, in an early case. In *Hopkins vs. Lang et al.*, 9 Ga., 261, Warner J. delivering the opinion, says: "We are of opinion, from a careful reading of the enacting clause of the statute, when taken in connection with the title thereof, that it was the intention of the legislature to make provision for the support and maintenance of the widow and children of the testator or intestate for the space of twelve months immediately after his death, according to their rank and condition in life, whether the estate be solvent or insolvent." If the estate were *insolvent*, it follows that the rights of the creditors must, according to this ruling, be postponed to the claims of the widow and children.

We will simply add that there is nothing in this record that shows that Mrs. Loyal was the wife of Loyal at the time of the adoption of the Code, or that he was then insolvent. There is, therefore, nothing in the record inconsistent with the position that her rights accrued since the adoption of the Code, and are as a consequence to be governed by it.

Judgment affirmed.

McCAY, J., concurred, but wrote no opinion.

WARNER, J., dissenting.

The question made by the record in this case is, whether the wife of an insolvent debtor is entitled to have the sum of five hundred dollars worth of real estate in a city, town or village, exempt from levy and sale in satisfaction of a judgment obtained on the 28th of October, 1861, according to the provisions of the 2013d section of the Code, or whether she is entitled to have only the sum of two hundred dollars exempted from levy and sale, under the Act of 1845. The debt was contracted and the judgment obtained prior to the adoption of the Code. The exemption of five hundred dollars is claimed *under the Code* and not under an Act of the legislature passed since the adoption of the Code.

The Constitution of this State, at the time of the adoption of the Code, declared that "retroactive laws, injuriously affecting *any right* of the citizen, are prohibited." The second section of the Code declares that "this Code shall take effect on the first day of January, 1863. All offences committed prior to that date shall be tried and punished under existing laws, and all rights or obligations or duties acquired or imposed by *existing laws* shall remain valid and *binding*, notwithstanding the repeal or modification of such law."

In my judgment, the rights of the creditor, as well as the rights of the claimant in this case, are to be measured and decided in accordance with the law, as the same *existed*, prior to the adoption of the Code. To hold otherwise would be to ignore that provision of the State Constitution which prohibits *retroactive* legislation at the time of the adoption of the Code, as well as the express provisions of the Code, which was adopted in strict compliance with that Constitution. I, therefore, dissent from the judgment of the Court in this case.

Vason vs. The City of Augusta.

WILLIAM J. VASON, plaintiff in error vs. THE CITY OF AUGUSTA, defendant in error.

1. The statute of 15th of February, 1856, enacts that the City of Augusta shall be and they are hereby authorized to elect an officer known as Recorder, in whom they may vest exclusive jurisdiction of violations of their ordinances, etc. The Act also provides that the Recorder shall be elected and hold his office for the term of two years, and shall take an oath *before the Mayor* well and truly to discharge the duties of his office, etc. *Held*, 1, that the object of this Act was to promote good government and order in the city, and that it was the duty of the Council to elect a Recorder, and that it was clearly the intention of the legislature, that the office of Mayor and the office of Recorder, should be separate and distinct offices, filled by different persons, one of whom is required to take the oath of office before the other, and that the provision in the statute which authorizes the Council or Mayor, in the absence of the Recorder, to appoint their body to preside in the Recorder's Court, contemplates the temporary absence of the Recorder, and does not authorize the City to abolish the office of Recorder, and direct the Mayor permanently to act as Recorder.
2. The City Council of Augusta have power to establish such rules and ordinances as shall appear to them requisite, and necessary for the security, welfare and convenience of the city, preserving peace, order and good government within the limits, and not repugnant to the Constitution and laws of the land.
3. Any person who shall erect or continue, *after notice* to abate a nuisance, which tends to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, is guilty of an offence indictable under the Penal Code of this State. The legal offence of continuing a nuisance is not complete before notice to abate. Until the notice is given, and the legal offence is complete, the authorities have power as a police regulation, to punish for the continuance of such nuisance, as would subject the offender to indictment under the Penal Code, after notice to abate. But when the offence against the Penal Code is complete, they have only the power to bind over the offender to the court, to answer for the offence.
4. A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises, by the tenant, during the term of the lease. If the nuisance existed upon the premises when the lease was made, the landlord is liable. But if the tenant continues the nuisance after he obtains exclusive possession and control, he alone is liable for its continuance. As the landlord, under our statute, is liable for repairs on the premises, if the nuisance grows out of his neglect to make the repairs, the tenant may make them, and set off their value against the rent due the landlord.

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nuisance. Jurisdiction. Landlord and Tenant. *Certio-*
Before Judge GIBSON. Richmond Superior Court.
Term, 1868.

Master Blodgett was Mayor of the City of Augusta, and
as Recorder thereof. As Recorder, he issued a sum-
requiring Vason to answer for an alleged violation of
ordinance of said city. That ordinance was, "no person
keep on his or her premises any nuisance to the annoyance
his or her neighbors. Any person so annoyed may com-
to a member of Council, belonging to his or her ward,
shall require, in writing, an abatement of the nuisance
claimed of, in twenty-four hours. Should the nuisance
be abated or removed, at the expiration of that time, for
7 day following, the person on whose premises it remains,
be fined in a sum not exceeding twenty dollars. No
man shall empty any privy, sink, water-closet or cistern
connected therewith or cause the same to be done, at any
except between the hours of 12 o'clock, P. M., and 4
o'clock A. M., under a similar penalty."

Vason appeared and objected to the jurisdiction of the
court, upon the grounds: 1st. Because, Blodgett being
Mayor could not issue a summons as Recorder, and was not
Recorder because his appointment was illegal. 2d. Because
the ordinance covered a crime punishable under the Penal
Code of the State, was therefore illegal and the Recorder had
no jurisdiction over such crime. 3d. The ordinance was ille-
gal because it prescribed a punishment for such crime,
different from that prescribed by the said Code.

Blodgett overruled the objections and proceeded with the

The evidence showed that Vason, as trustee, owned
a lot in Augusta, occupied by Butt and others as his tenants
which Butt, or Butt and Brother had occupied for
twenty years, then last past. The nuisance complained of
was a privy, on said lot attached to Butt's store, and which
was twelve years old. It was offensive. Neighbors had
complained of it to the inspector, and he notified Vason of
the complaints. A member of Council had also given him

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notice in writing. He refused to abate the nuisance, saying it was the duty of the tenant. Vason's counsel insisted upon this also before Blodgett, but he held that Vason was liable for the nuisance, and fined him \$20 00. Vason sued out his *certiorari*. Besides the foregoing facts the answer to the *certiorari*, showed that in January, 1868, an ordinance was passed by the Mayor and Council, ordaining that "the Mayor of the city be required to act as Recorder, without salary," and repealing all conflicting ordinances. The conflicting ordinance referred to was as follows: "The Recorder shall be elected annually, on the second Saturday in January. He shall preside in the Recorder's Court and perform such duties as are hereinafter required of him, and shall receive a salary of eight hundred dollars *per annum*." Subsequent sections gave to his court exclusive jurisdiction over violations of the city ordinances, etc.

Judge Gibson overruled each of the points in the *certiorari*, and error is assigned accordingly.

C. SNEED, (by MONTGOMERY) for plaintiff in error.

J. T. SHUEMAKER, for defendant in error.

BROWN, C. J.

1. The 16th section of the Act of the Legislature, passed 15th of February, 1856, declares: "That the City Council of Augusta shall be and they are hereby authorized to elect an officer to be known as 'Recorder,' in whom they may vest exclusive jurisdiction of all violations of their ordinances, and he shall have power to try and determine the same," etc.

The 17th section enacts that, "said Recorder shall hold his courts at such times and places as said City Council may prescribe, and they shall direct the mode of summoning or bringing up parties for trial. In the absence of the Recorder, the City Council or Mayor may appoint one of their body to preside in said Recorder's Court."

The 18th section provides, that, "said Recorder shall be elected and hold his office for the term of two years, shall take

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an oath before the Mayor well and truly to discharge the duties of his office," etc.

Under these enactments, we think it was the duty of the City Council to elect a Recorder. The legislature had in view the preservation of order, and the promotion of good government in the city, in conferring the authority upon the City Council to elect said officer, who is to fill the place, in fact, of a Judge of the Criminal Court of the city; and it is not mere matter of option, but it is the duty of the City Council to elect said officer in accordance with the statute, from time to time.

This view is abundantly sustained by authority. In the case, of the King vs. the Inhabitants of Derby (Skinner 170) a motion was made to quash the indictment found against the inhabitants for refusing to meet and make a rate to pay the constable's tax, on the ground that the statute was not imperative, but merely "they may meet," etc. The Court held that *may*, in the case of a public officer is tantamount to *shall*, and if he does not do the act required, he shall be punished.

The Statute of 14th Car., 2 Ch. 12, says the church wardens "shall have *power* and *authority* to make a rate," etc. It was insisted that this act simply invested them with power to make the rate, but that it was not obligatory, and they were not punishable for neglecting it. The Court held otherwise, observing that when a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*. 2 Salk., 609; Carth., 203. And it was added that, when a statute says a sheriff *may* take bail, this is construed he *shall*, for he is compelled to do so. See also 3 Atk., 166; 1 Wend., 537; 5 J. Ch. Reps., 113; 5 Con., 188.

If, however, we were to admit that it was within the discretion of the City Council to organize said office of Recorder under the statute or not, having exercised that discretion in the organization of the Court, they had no right to abolish the office, 3 Hill's N. Y. Reps., 615, 616.

The Recorder, when elected, is required to take the oath of

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office before the Mayor. And the City Council or Mayor, may appoint one of their body to preside in the Recorder's Court in his absence.

We think it very clear that the City Council have no right under this Act to remove the Recorder and appoint the Mayor *permanently* to act as Recorder. They may, by a provision of the statute, remove the Recorder (for cause) by a vote of two-thirds of all the members of the Council. But it can only be done for cause, and in that case, it is very clear that it is their duty to elect another Recorder to fill the office from which they have removed the incumbent. And they have no right to elect the Mayor to fill the vacancy, as the Recorder must take the oath of office before the Mayor, and it would be absurd to say, that he could take the oath of Recorder before himself as Mayor. He may, by appointment of the City Council, preside, not in his own court, but in the "Recorder's Court" in his absence. The statute doubtless contemplates the case of the temporary absence of the Recorder.

2. The City Council have the authority under the charter to establish such by-laws, rules and ordinances, as shall appear to them requisite and necessary for the security, welfare and convenience of the city, for preserving peace, order and good government, within the same, not repugnant to the constitution and laws of the land. Under this authority they may make all such rules and regulations as the health, comfort and convenience of the people, under their jurisdiction, may require, and may provide for the punishment of all such offenders against their ordinances as are not under the constitution and laws, punishable in the Criminal Courts of this State. They may also bind over all offenders who violate the Penal Code of this State, within said city, for trial in the proper Courts.

3. Section 4478 of the Revised Code enacts, that any person who shall erect or continue, *after notice to abate*, any nuisance, which tends to annoy the community, or injure the health of the citizens in general, or to corrupt the public morals, shall be indictable and punishable. We hold that the indictable offence is not complete under this section, be-

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re notice to abate, and that the City Council may cause to be punished any person who maintains a nuisance in the city in violation of their ordinances, at any stage previous to the condemnation of the offence under the Penal Code. But if the nuisance is complete under the Penal Code, they should bind over the offender for trial in the court having jurisdiction of the offence. They may also take the legal steps to have the nuisance abated.

4. The only remaining question made by this record is, the liability of Vason for the alleged nuisance maintained upon the premises by Butt, his tenant.

As we understand the rule, the landlord is not liable for a nuisance maintained by his tenant during the period of the lease. The landlord is liable, however, for any nuisance which may exist upon the premises at the time he makes the lease. Taylor's landlord and tenant, 95. But if the tenant continues the nuisance, after he obtains exclusive possession and control, he alone is liable for its continuance. As the evidence shows that Butt, the tenant, had occupied the premises for the last eighteen years, we do not think the landlord is liable for a nuisance maintained upon them.

Section 2258 of the Revised Code makes it the duty of the landlord to keep the premises in repair. And it is insisted in this case that the failure of the landlord to make the necessary repairs aggravated, if it did not cause the nuisance. The evidence to establish this is not very satisfactory. But, if it were established, that the nuisance grew out of the failure of the landlord to make the repairs, this could not relieve the tenant, as he might have made them and charged them to the landlord, and he might set-off their reasonable value against the rent due the landlord, unless he had, by contract with the landlord, bound himself to make the repairs.

Judgment reversed.

Green et al., vs. Lowry.

J. PERCY GREEN, *et al.*, plaintiff in error, vs. JAMES H. LOWRY, defendant in error.

[This case was held up under the Military Order.]

1. An obligation was given by J. Percy Green to Lowry, in February, 1865, for \$2,500 in Confederate Treasury notes, for the board of his three sisters, while he was absent in the army, when one dollar in gold was worth forty-six dollars in Confederate notes. On the 18th of November, 1865, before the Ordinance of the Convention for scaling Confederate contracts could have been well understood by the defendants, said Green, who was inexperienced, and his sister Julia, just of age, who boarded with Lowry and was under his protection till about the time it was given, executed a note, payable one day after date, for \$450 00, which was to be in lieu of the obligation of Green for the \$2,500 Confederate note, which the maker's charge was given in that shape, on the fraudulent representations and false promises of Lowry, that they should have two or three years within which to pay it, and that he having taken advantage of their inexperience and of their ignorance of their legal rights, in obtaining the note brought suit on it in a short time. *Held*, that the Court erred in refusing to allow evidence tending to prove these facts, to go to the jury, and in ordering a verdict for the plaintiff for the amount called for by the face of the note.
2. The note having been executed at a time when the parties did not know it was necessary to place a revenue stamp upon it, and on the fact being ascertained, said Green having voluntarily placed the necessary stamp on the note, and again delivered it to the payee, whereby the government received the revenue to which it was entitled, Green will not be allowed to controvert the fact that the note was legally stamped.

United States revenue stamps. Note given under mistake, etc. Before Judge MILNER. Whitfield Superior Court November Term, 1868.

In October, 1866, Lowry sued J. Percy Green and Julia Green, his sister, upon their joint and several promises, note for \$450 00, payable to Lowry, dated the 18th of November, 1865, and due one day after date.

The record does not show that any plea was filed, but their defence appears by the evidence offered by them. It was agreed that the testimony of the defendants should be heard, and that the Judge should then pass upon its admis-

lity, and direct what should be done by the jury. Julia testified that she and her two sisters rented a room from Lowry and furnished their own food for about three weeks, then boarded with him. Percy was in the army and Lowry said that he would make no agreement as to the price for their board till Percy's return, but that he would charge no more than the actual cost of their board. When Percy returned Lowry and he agreed that Lowry should receive, for said board, \$2,500 00 in Confederate Treasury notes, no time was fixed for the payment. Julia owed Lowry 10 00 in said currency for that amount loaned her about the time of the fall of the Southern Confederacy, and Percy paid him for a jeans overcoat bought about Christmas, 1864. In the fall of 1865 Percy and Julia proposed to Lowry to settle their indebtedness to him in good currency, by arbitration; Lowry said no, but that he knew they were then unable to pay, so he would take their note and not press them for the money. Julia did not believe they owed Lowry the amount of said note, but was mortified because they could not pay him, wishing him satisfied, and proffering to pay him double what was due, if Lowry would wait two or three years, she relied on his promise not to press them for the money till they had ample time to make it, and signed said note. About Christmas, 1864, Percy delivered to Lowry a slave twenty-two years old with instructions to sell him and apply the proceeds to the payment of the board, and the remainder to do as he saw proper. Lowry kept the slave till he was emancipated. Julia had a negro boy sixteen years old, who worked for Lowry and a negro girl who did his house work, and a negro man who worked for him one day in each week, while she boarded there. Besides, she turned over to Lowry provisions worth \$400 00 in Confederate currency. She admitted signing the note after all the above occurred, and that she knew its contents, but said she did so because she relied on Lowry's promise to wait as aforesaid.

Percy testified, that he learned from plaintiff that the agreement was, that, in consideration of the services of said slaves, Lowry could charge nothing but the cost of the provisions for

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said board, and would wait his return to estimate the cost. He returned in February, 1865, and he and plaintiff, by calculation, found that the cost of said provisions furnished to his sisters was \$1,250 00 in Confederate currency. Percy thought that sum too small and offered to allow Lowry \$2,000 00, but Lowry not being satisfied, was asked to say what would satisfy him, and he said \$2,500 00. Percy then gave him his obligation for \$2,500 00, payable in Confederate Treasury notes, of which it then took forty-six dollars to buy one dollar in gold. He then turned over to Lowry said negro man, then worth \$4,500 00 in Confederate notes, to sell him and pay the obligation, and use the surplus of his price in Lowry's business, subject to Percy's order. Lowry agreed to sell the negro, but did not, and kept him until he was emancipated. Percy's sisters boarded with Lowry only about eight months. In the fall of 1865 they wished to adjust the matter by arbitration, but Lowry declined. They asked him how much he claimed. He said they could not pay then, and it was uncertain when they could, and therefore he must charge more than he otherwise would and asked their note for \$450 00, saying if they would give it, they should have their own time in which to pay. Percy, being then unable to pay, having lost all by the war, but his farm, which was dilapidated, and not knowing but that Lowry could enforce the payment of said \$2,500 00 obligation, and relying on the promise to wait, signed the note, in satisfaction of that obligation; all the matters alluded to by him and his sister were settled in this note. Percy had never done business for himself, he and his sisters were orphans; he went from college into the army, and there staid till the war ended.

The note specified that it was given "in consideration of the board and other expenses" of the sisters. The Court held that the evidence was inadmissible. Another question remained. The note was not stamped when it was given. Percy did not then know that a stamp was necessary. Some time afterwards Lowry asked Percy to stamp it, and he did so, Lowry saying that he did not know it was necessary, when the note was made. It was shown that that United

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s Internal Revenue District had been laid out and collector therein appointed before the note was given. For these facts the note was objected to, because it was stamped when made. The objection was overruled, and the court had judgment for the full amount of his note. Said rulings are assigned as error.

CUTCHEN & SHEWMAKE, by **D. A. WALKER**, for plaintiff in error, as to the stamp, cited Chitty on B., 119; Act of Congress 3d March, 1865, 1st section Act of 30th June, 1864, section 158; as to the admissibility of the parol evidence, on the ground of fraud, *Ferguson vs. Carrington*, 9 B. and C. 204; *Good vs. Green*, 15 M. and W. 216; *Earl of Bristol vs. Lord*, 1 B. and C., 514, and on the ground of failure of consideration, Story on Pr. N. section 187, Ch. on B., 72-3; the facts make a case of usury and the jury should have found the amount of usury; 26 *Ga.*, 404; 28, 526, 9, 30; *Sedg. on Dam.*, 400.

K. MOORE, for defendant in error, as to the parol evidence, cited *Parsons on C.*, 361-2, *Kincard vs. Higginson*, 1 Bibb's R. 396; and said that unless the stamping was fraudulently omitted, the omission did not affect the judgment. 47 Barb. R., cited in 6 Law Register, 574.

TOWN, C. J.

We are satisfied that the Court erred in withdrawing the evidence from the jury in this case, and ordering a verdict for the plaintiff below, for the full amount of his note.

The evidence seems to justify the conclusion, that the note for \$2,500, given upon the Confederate basis, by the plaintiff Green for the board of his sisters, was given for as much as Lowry was entitled to, under his agreement with the plaintiff.

And this view of the case is strengthened by the evidence as to the service of the negroes which he received while he was with him.

The next question for consideration would seem to be,

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whether the obligation for \$2,500, made when one dollar gold was worth forty-six in Confederate Treasury notes, a sufficient consideration for the note for four hundred fifty dollars to be discharged in legal money, which made by J. Percy Green and his sister Julia, under circumstances detailed in the evidence. If the promissors not overreached by Lowry, and there was no fraud or take in the transaction, the consideration, however inadequate if not illegal, was sufficient.

The Code, sections 2,700, 2,701, lays down the rules as follows: "Mere inadequacy of consideration alone, will void a contract. If the inadequacy be great, it is a strong circumstance to evidence fraud; and on a suit for damages for breach of the contract, the inadequacy of the consideration will always enter as an element in estimating the damages."

If the consideration be founded in a mistake of fact or the promise founded thereon can not be enforced."

In Story on Contracts, section 432, the rule is laid down in this language:

"When the inadequacy of consideration is so gross as to create a presumption of fraud and overreaching, or of unconscientious advantage, taken under circumstances of distress, improvidence, on the one side, or of mental incompetency on the other, the contract founded thereon can not be enforced at law, or in equity; and a Court of equity will, at the instance of the party deceived, interfere and set it aside if it is executed. In cases of gross inadequacy the Court will also take advantage of every circumstance which indicates imposition or improper advantage, to found a presumption of fraud, and thereby to rescind the contract. The mere inadequacy of the consideration is not, however, in such cases, ground upon which a contract is invalidated, but the fact which is thereby indicated, and however inadequate the consideration may be, yet if the circumstances of the case indicate no unfair advantage on the one side, or no great incompetency on the other, the contract will be valid."

See also, *Warmock vs. Rodgers*, 9 Ga. R.. 60; *James Morgan*, 1 Lev. 111; *Hough vs. Hunt*, 2 Ham. R. 1

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ams vs. Powell, 1 Iredell Reps. 460; Hardeman vs. e, 10 Yerger's R., 202; Butler vs. Hogkill, 4 Dess. R., Udall vs. Kinny, 3 Cow. R., 590; Johnson vs. Dorsy, 1 R., 269; Edwards vs. Burt, 15 Eng. Law and Equity 35; Judge vs. Wilkins, 19 Ala., 765.

ere is at least some evidence in this case that J. Percy acted under the impression that he was in law bound y the \$2,500 called for by the obligation, in lawful y, and that he may have acted under a mistake of law, the true consideration of the new note. Did he give his assent to the contract? Was his free will restrained by ts, or other arts? Revised Code, section 2,710. Julia een boarding with Lowry, the plaintiff, and had been tained to look to him as her protector, while her brother bsent in the army. She had just arrived at lawful age. she overreached by him? Was he guilty of fraud in ing them to believe that he would forbear and give of payment not expressed on the face of the note, when d not intend to do so? Were the makers of the note r a mistake as to the effect of the scaling ordinance just d by the Convention? Were they both young and in- ienced, and very much under the influence of Lowry? there gross inadequacy of consideration? As the evi- a bore upon these points, and as it is the peculiar province e jury to determine upon the evidence, and to find the we think the Court should have permitted the evi- s to go to the jury.

As the parties were ignorant of the fact that the law red a revenue stamp to be placed upon the note, and as got together after that fact was ascertained, and Green d the stamp upon it, (by which the government received venue), and again delivered the note to Lowry, we are nion, that Green will not now be permitted to contro- the fact that the note is legally stamped. dgment reversed.

Dunagan *et al.*, vs. Dunagan *et al.*

STEPHEN R. DUNAGAN *et al.*, plaintiffs in error, vs. BENJAMIN DUNAGAN *et al.*, defendants in error.

1. Receipts for money are always only *prima facie* evidence of payment and may be denied or *explained* by parol.
2. When a bill of exceptions is filed and error assigned on the record by the Judge of the Superior Court on the trial of a cause, the exceptions and the assignment of error must show distinct points decided, with such statement of the facts as are necessary to a full understanding of the points made, and if the bill of exceptions does this, this Court will not pass upon the rulings complained of.
3. It was not error in the Court to refuse, on the facts of this case, a new trial asked for, nor was the charge of the Court under this head as they appear on the record, and the certificate of the Judge a sufficient ground for a new trial.

Parol evidence. Motion for new trial. Before
DAVIS. Hall Superior Court. September Term, 1861.

In October, 1837, Benjamin Dunagan gave bond as administrator of the estate of Ezekiel Dunagan, deceased, with Isaiah Dunagan, James J. McCleskey and David Eberhart, as his securities. McCleskey, as guardian of the property of the minor heirs and distributees of said estate, filed a bill in equity against said administrator and, on the 22d of April, 1849, obtained a verdict for his wards, as follows: \$1,700 for said Stephen, and \$383 00 for each of the other wards, and costs. Judgment was entered for the total sum of \$1,700 and a *fi. fa.* was accordingly issued on the 5th of April, 1849. On the next day the deputy sheriff made upon it a return *nulla bona*. On the 25th of June, 1849, it was levied upon the undivided half of lot of land No. 236, 12th district, 3d section of said county. In August, 1849, said levy was dismissed by plaintiff's order, and on the same day levied upon certain fifty acres of said lot. On the 1st of November, 1849, said fifty acres were sold by the sheriff to McCleskey for \$135 00. After paying costs, the proceeds of said sale, \$129 08, were credited on the judgment. It was then levied upon a horse; he was sold and another credit of \$30 75, was put upon the *fi. fa.* In

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1851, there was another return of *nulla bona*. In 1856, it was levied on certain land whereon the defendant then lived, and in July, 1857, it was levied on land on which he then lived. In September, 1857, the sale under the levy was postponed by plaintiff's consent; the levy was disposed of by some one filing a claim to the same as mentioned.

Afterwards (it appears), Stephen R., Daniel C., Levi J., and George W. Dunagan and J. R. McCleskey sued said administrator and his securities on said bond. The plea was payment of the *fi. fa.* At the trial, plaintiff's counsel read in evidence the bond, the bill and decree, the *fi. fa.*, with said proceedings thereon and closed.

The defendant, being on the stand as a witness, was presented with certain receipts, and they were read in evidence, accompanied with his explanations, as follows: A receipt by J. R. McCleskey to said administrator, as such, for \$250 00, dated the 25th of December, 1857, and being for the balance due of McCleskey's interest in said estate in right of his late formerly Mary Jane Dunagan; the defendant said McCleskey had bought one-half of the interest of Levi J., and Daniel C. bought the other half, and that this receipt was for one-half of that half interest also. A receipt dated 26th of December, 1852, for \$500 00 signed by Daniel C., Levi J., George W. and Margaret Dunagan, to be credited on said estate; the defendant said that that sum was in gold, and was to go to Daniel C. and George W. The bill of exceptions recites as follows: "The defendant then introduced J. R. McCleskey's receipt for a note on Margaret Dunagan and James J. McCleskey, for \$213 00, dated prior to the judgment, which was filed out, when defendant testified that the money of said note could not be taken out of the hands of the guardian, that it should remain there for the benefit of the orphans.

The defendant introduced an order from George W. Dunagan dated July 18th, 1861, acknowledging to have sold the Georgia claim for \$250 00, \$33 33 down, the balance on account and also, had collected the Duncan claim, (the amount which does not appear), and testified in relation to said

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gold mine claim, and that the same should be \$450 00. The defendant then introduced a receipt from Daniel C. Dunagan for \$31 00, dated June 20th, 1850."

Counsel for defendant then offered the bill of advancements made by intestate while in life, to which counsel for plaintiff objected, when defendant testified that James J. McCleskey promised to pay him the \$60 00, (the amount of advancements); he stated that it was for a mare given his (McCleskey's wife) upon their marriage many years before, which was to be credited upon the decree; that there were various other matters of payment which he could not now remember, and for which he had no receipts, but that said decree was paid off in full. He further testified that Stephen R. Dunagan was paid off soon after the judgment was rendered, that he (witness) loaned about \$200 00 to his brother Joseph Dunagan, and that he paid it to Stephen R., to pay Dr. Banks for the land he (Stephen R.) purchased of Dr. Banks.

Crossed.—He was not present, but understood he so paid it, and he repeated, generally they were all and each of them paid off in full; that Daniel C. Dunagan was paid by loaning him with George \$500 00 to go to California; that Levi's claim belonged to J. R. McCleskey and D. C. Dunagan; that George W. Dunagan was paid by the claim in the Rocky Mountain country; that Stephen Dunagan went to Alabama, then to Arkansas, some ten or twelve years ago; that Daniel C. Dunagan went to California about sixteen years ago, and had not returned; that Levi J. Dunagan left this country about the same time as Daniel C. Dunagan; that George W. Dunagan went to Alabama some ten or twelve years ago; that none of the above plaintiffs have ever troubled him since about his owing them anything since they left this country.

On cross-examination he stated: He could not remember any transaction, time or place when he paid plaintiffs anything, except what he had already stated in his direct examination; that the sum of money he loaned his brother Joseph Dunagan, was about \$200 00; that the payment to J. J. McCleskey, was made some time after the claim was in E. M. Johnson's hands, and he stated that E. M. Johnson had been

essing him ever since, and that Colonel Johnson said that (Dunagan) ought to have paid the money to him instead to J. R. McCleskey, and said that McCleskey said that he s sorry that he had ever taken the administration out of hands, for that he had never received anything from J. McCleskey, who was the guardian of his wife.

Plaintiff, in rebuttal, introduced an order from G. W. nagan, from Colorado, asking Johnson to allow defendant 00 00 in settling with the heirs of deceased, for that he, W., had that much of defendant's money.

THOMAS LITTLE testified: That Stephen R. Dunagan left s country in 1857; that previous thereto, he (witness), at with said Stephen R., to see Dr. Banks, to buy said d; that only about \$60 00 was paid on said land; that he l not buy it, and Stephen R., sold it to C. Q. Chandler, o gave his notes for the land; that he (witness), then and re bought the claim of Stephen R. Dunagan, and has been serving it ever since, and has not received anything.

Defendant's counsel then proposed to make said Thomas tle a party in the place of said Stephen R. Dunagan, and Little, refused to become a party.

On cross-examination, Little stated that he gave Stephen Dunagan for his claim, two mules, and that all he knew out Stephen R. Dunagan's claim he learned from Stephen Dunagan himself; that Stephen told him that his claim ounted to about \$450 00.

The testimony, so far as the sayings of Stephen R. Duna- n in his own favor, were concerned, was ruled out.

The Court charged the jury as follows: The suit was ough on an administrator's bond which was given to the ferior Court, which at the time, was the Court of Ordinary. is question for them to determine was, had there been a ach of the bond. The plaintiffs contended that there had n a breach of that bond in failing to pay a certain decree hich the plaintiffs in that action had obtained against B. nagan, the administrator of Ezekiel Dunagan; that from nvidence, they must determine whether there had been a ach of said bond. It was charged that they could not go

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behind that decree in allowing credits in favor of the defendant in that decree. As to the execution issued on that decree which was in evidence, various entries had been made.

The Court then stated that in order that the jury might understand, he would state, the difference in levies on personal estate, and levies on real estate undisposed of; that the levy of an execution on personal property is a satisfaction of a judgment, so far as to throw on the plaintiff the burden of proving either that it was insufficient, or that its proceeds were applied to the extinguishment of prior liens, or that it was otherwise unproductive and made so without fault in the plaintiff or the levying officer. A levy on personal property sufficient to pay the debt, which is dismissed by the plaintiff with the consent of the defendant, extinguishes the judgment, so far as third persons may be affected by it. A levy on real estate is not *prima facie* evidence of satisfaction, and although unaccounted for, does not extinguish the judgment. You will determine, from the evidence in this case, upon which kind of property the levies are made, and apply the rules of law, according as you shall determine from the evidence upon which species of property the levies have been made.

The Court further charged, that any act of the plaintiffs in that decree which injures the securities on the bond sued on; or exposed them to greater risk or worked an injury to them, will exonerate the securities; that the making a contract by the plaintiffs in the decree, with the defendant Benjamin Dunagan, if it would produce the above effects, and if done without the knowledge or consent of said securities, would relieve them from their liability on the bond sued on. The jury would determine from the evidence in the case, whether anything had been done between the plaintiffs and said Benjamin Dunagan that had produced any of the aforesaid results, without the consent of the above named securities on said bond; that the granting mere indulgence would not liberate the securities. It was also charged that all the witnesses stood fair before them unless impeached, but that they

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to judge of their credibility, and had a right to take into consideration their relations to the case.

The jury retired, and returned with a verdict in favor of defendant.

Whereupon, during the same term of the Court, counsel for plaintiffs moved the Court for a *rule nisi*, calling on the defendant to show cause why a new trial should not be granted on the following grounds, to-wit:

. Because the Court erred in permitting the witness Benjamin Dunagan to explain, enlarge and contradict the written evidence, which were receipts and an order.

. Because the Court erred in permitting the defendant Benjamin Dunagan, to give in evidence that said judgment was paid in full, without giving any facts to support it, etc.

. Because the Court erred in allowing the defendant, Benjamin Dunagan to give in evidence, that the amounts of the notes made by Margaret Dunagan and James J. McCleskey, and advancements made by intestate while in life, were to be limited on said decree and judgment after the same (that is writings) had been ruled out.

. Because the Court erred in charging the jury that they must determine by their verdict, whether any levy was made on the *fi. fa.*, and unaccounted for, sufficient to satisfy the debt or discharge the sureties. Also, that they must determine whether any contracts were made between plaintiffs and defendant sufficient to exonerate the sureties.

. Because the verdict is contrary to the charge of the Court; contrary to the evidence, to law and equity.

The Judge refused a new trial and error is assigned on one of the grounds for new trial. In certifying, the Judge certified that he decided "that receipts only are an exception to the rule of evidence, that parol evidence can not be given to vary, add to, or substantially contradict a written instrument; and that as no objection was raised to Benjamin Dunagan's testimony when he gave his testimony about the writing called in evidence on the first ground of the motion for a new trial, an order; exception was taken that Benjamin Dunagan could not prove payment of the decree, simply by swearing, in a general way,

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that payment had been made, the Court decided that he might be questioned fully, in detail, how, when, and where the payments were made, and he was so examined, both on his direct and cross examination. The reason why the charge was given as it was, in regard to the securities on the administrator's bond, was because defendant's counsel contended, in argument before the jury, that the securities were exonerated."

E. M. JOHNSON, for plaintiffs in error.

JOHN GRAY, for defendants in error.

McCAY, J.

1. A receipt for money is, as a general rule, an exception to the principle that parol evidence is inadmissible to explain or contradict a writing, (Code, section 3754; 1 *Kelly*, 18; 3 *Kelly*, 215.) Unless it also be a contract, *Sullivan vs. Cox*, 7 *Ga.*, 144. This is a receipt for money, and under the rule, we do not think the defendant was concluded, by the fact that he accepted it, from showing in the first place, the independent fact that the signer of the receipt was the owner of part of another share, and secondly, that the five hundred dollars was in full of that share also. Why does not this come within the exception as to receipts?

As to the point that the Court permitted the defendant to show that one of the plaintiffs had an advancement, during the life of the testator, and which was not taken into account in the equity case, and that, after the judgment, he had agreed it should be accounted for by him, we see no error. In the first place, this equity decree is only *prima facie* binding on the securities, they may go behind and show that it was not a correct adjustment. *Bryant vs. Beall*, 1 *Kelly*, 357; *Bradwell vs. Spencer*, 16 *Ga.*, 581. It was competent, too, even for the defendant to show a subsequent agreement to lessen the judgment, in consideration of the error in not taking the advance into the account. *Rodgers vs. Atkinson* 1 *Kelly*, 18.

2. There are one or two other errors assigned, growing out of the admission of parol evidence by the Court, which we confess ourselves unable, from the record, to understand. The Code requires, that the bill of exceptions shall plainly and distinctly specify the decision complained of, and if, from carelessness or haste, parties fail to make such a case as that, the Court can clearly understand what has been done, and how the party complaining has been injured; it would be at groping in the dark, perhaps unjustly, to the Judge before and the parties, to undertake to adjudicate the matter.

3. We see no error in the charge of the Court, taken in connection with his certificate, of the ground taken by the defendant's counsel in his argument before the jury.

The Judge charged that the jury could not go behind the decree. This was a stronger charge for the plaintiffs than they were entitled to against the securities, if there was any evidence to justify them in so doing, 1 *Kelly*, 357. The charge of the Judge in reference to the entries on the *fi. fa.*, and in reference to the effect of indulgence, was in reply to the argument of the defendant's counsel before the jury, and was proper, under the circumstances. It was competent for the defendant to be permitted to state, in broad terms, that the decree was fully paid. He was open to cross-examination by the plaintiff, and to contradiction, and it was a question for the jury to determine, whether the whole evidence did or did not show his statements to be correct. Here was every old claim; the evidence clearly showed many and complicated transactions between the parties. The truth of the case turns very much upon the truthfulness of the defendant. Of that, the jury was the judge, and we do not think the verdict ought to be disturbed. The jury and the Court before, have given it for the defendant and we will not interfere.

Judgment affirmed.

 Whitlock *et al.*, vs. Vaun.

W. W. WHITLOCK, *et al.*, executors, plaintiffs in:
 JANE VAUN, defendant in error.

1. By the third item of the will of A. V., he gave to his wife, widowhood, certain negroes and other personal property, five hundred and twenty acres of land, known as his "Home place." In case of her marriage, the negroes were to be divided into she to take one and his two youngest sons each one share, and two youngest sons to take the balance of the property in item, including the "Home place," which was to be his guardian till they were of age. Testator afterwards sold the "Home place" to K. for \$10,000, and took notes, and gave bond. After this sale, he added a codicil to his will, in which he expressed purpose to give direction to a "certain fund that he shall hereafter collect." The codicil recited the fact of the sale of the "Home place" for \$10,000, and directed that "said sum of money" be invested by his executors in a plantation for the use of his wife during her widowhood, should marry again, said plantation to go to his two youngest sons. The sum set forth in the third and fourth items of his will. He afterwards collected \$2,500 of the purchase money, which he used, and died. The balance of the purchase money has never been collected. Title to the "Home place" remains in the estate, and K., the purchaser, is insolvent. *Held*, that there was an ademption of the specific legacy to the extent of the \$2,500 collected and used by the testator before his death, and as there is nothing for the codicil to act upon, the purchase money due at his death, (which is the "certain fund" referred to in the will, and was the object of it,) is collected, the codicil, made under the will, did not revoke the will, as to the "Home place;" and that the wife and two youngest sons take it, under the third item of the will.
2. But should the purchaser, at a future time, pay the balance of the purchase money and interest, and compel a conveyance of the "Home place," the codicil will then attach to the fund, when so paid in, and it is the duty of the executors to invest it in a plantation for the use of the children as directed in said codicil.

Construction of will. Ademption of legacy. Before the Court. **HANSELL.** Thomas Superior Court. March Term 1860.

On the 4th of May, 1859, Adoniram Vaun made a will. By the third item of it he gave to his wife, Jane Vaun, *durante viduitate*, twenty slaves and his "Home place," with stock, furniture, provisions, etc. If she married, the slaves and their increase were to be divided equally between her and his two minor sons. The fourth item provided

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slaves belonging to said minors, after such division, and all the other property mentioned in the third item should be divided equally between said minors, each taking his half upon attaining his majority, and that during her widowhood Mrs. Vaun should receive the rents, issues and profits of all the property covered by the third item, except so much of them as was necessary for the maintenance and education of said sons. No part of said property was to go to the payment of the debts, until the residue of the estate was exhausted, but so soon as it was ascertained that there were other assets sufficient to pay the debts, the executors were to turn over all of said property to Mrs. Vaun and the testamentary guardians of said sons, and after that, the executors were to have no further control over that part of the estate.

He made other bequests to trustees for his daughters, and nominated Smith Paramour and said Whitlock as his executors. On the 4th of May, 1860, he made a codicil by which he made a different disposition of one of the slaves mentioned in said third item, and provided that \$900 00 be paid to the said trustees out of the property mentioned in said third item, because he had expended that sum on that property since making his will.

In October, 1860, he made another codicil, stating his reason therefor to be "to give direction to a certain fund that I shall have," and provided as follows: "In consequence of my having sold the residence and lands attached to the same, as bequeathed in the the third item of my will and testament, for the sum of \$10,000 00, it is my desire, and I do will that said sum of money be re-invested by my executors before named for a plantation for the use of my beloved wife during her life or widowhood. If she should marry again, said plantation is to go and to belong to my beloved sons," said minors "as specified in the third and fourth items of my will and testament."

In January, 1861, testator died. The will and codicils were proven, and the executors qualified and took possession of the estate. In 1867, Mrs. Vaun, in behalf of herself, and the prochein ami of said sons, filed her bill against said execu-

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tors, setting forth the foregoing and the following facts: Testator intended that she should have a farm and slaves to work it. The mass of his estate was in choses in action which had not been collected, and therefore no farm had been bought for her. Slavery was abolished, and therefore she could never have slaves to work a farm. The other property given to her and said minors was not sufficient for her support, and the maintenance and education of said sons. She therefore prayed that the executors be compelled to pay over to her \$10,000 and interest, that part be hers, and that she be allowed to invest the balance of it for the maintenance and education of said sons.

The executors, by answer, admitting the facts averred, said the change of circumstances could not change the will, and such a change would be unjust to the other legatees, because the estate could not pay the legacies, nor would sell for \$10,000 00. They said no interest ought to be allowed; that the proceeds of the "Home place" constituted the fund out of which testator intended said bequest to be paid; that testator sold the "Home place" to one Kears, for \$10,000 00 on a credit, taking Kears's notes. He tendered the complainant said notes, or the "Home place," (of which they held the title, Kears having gotten no title,) in payment of the legacy; that besides the "Home place" there were no assets in this State but \$3,000 00 or \$4,000 00 in doubtful notes. The parties agreed that the Chancellor should decide the matter upon the bill and answer. He decreed that the executors should pay to Mrs. Vaun \$9,100 00, with interest only from the 1st of January, 1866, (because interest could not have been made before that date,) with the power in her to use the interest of said sum for the support and maintenance of herself and said sons and their education; that the principal be invested in good securities under his direction, and that the \$900 00 be paid as provided by the first codicil.

The executors excepted, and say the Chancellor erred in requiring said \$9,100 00 paid, and the complainant says he erred in not giving her interest from January, 1861. Though it does not appear that any evidence was introduced in the

assignment of errors, he states that testator had received \$2,500 from Kearse, and the executors offered to pay that to complainant, and give her the notes, and though the reasons for the decree *in extenso* are in the record, there is no allusion to \$2,500 00 in the record elsewhere than in the said assignment. But in the argument said assignment was treated as being based on the evidence.

A. B. WRIGHT, WILLIAM DOUGHERTY, J. L. SEWARD,
plaintiffs in error.

A. D. MCINTYRE, for defendants in error.

BROWN, C. J.

1. By the third item of his will the testator gave to his wife during her widowhood, twenty negroes and other personal property, and the "Home place," upon which he then resided, consisting of about 520 acres of land in Thomas county. In case of her marriage, he directed that the testamentary guardians of his two youngest sons, Henry A. and Daniel M. Vaun, apply to the Court of Ordinary, and have an appraisement made, of the negroes, and that they be divided into three lots, and that his wife and her husband receive one of said lots, to be made equal, if not equal, as her share of his estate mentioned in said item.

By the fourth item he directed, in case of his wife's marriage, that all the property mentioned in said *third item*, except the one-third of the negroes, shall go to his said two youngest sons, to be kept together by their testamentary guardians till they are twenty-one years of age.

The will bore date on the 4th day of May, 1859. On the 4th day of May, 1860, he made a first codicil to his will which has no relevancy to the point now in issue.

On the 20th day of October, 1860, he made a second codicil in which he recited that he was desirous of altering and changing, and giving some direction to a "certain fund," which he shall have, and proceeds as follows:

"In consequence of my having sold the residence and lands

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attached to the same, as bequeathed in the third item of my will and testament, for the sum of ten thousand dollars, it is my desire and I do will, that *said sum* of money be reinvested by my executors before named, for a plantation for the use of my beloved wife during her life or widowhood. If she should marry again said plantation is to go to and belong to my beloved sons Henry A. Vaun and Daniel M. Vaun, as set forth and specified in the third and fourth items of my will and testament."

The record shows that the sale of the home place mentioned in said third item of the will was made to one Franklin Kears, who took bond for titles, and afterward paid to testator in his life time \$2,500 of the purchase money. The title still remained in the testator, and has not passed out of his estate. The purchaser is admitted to be insolvent, and unable to pay the balance of the purchase money; and the question now arises what are the rights of the widow under the will. No point is made in reference to the personal property, as the negroes have all been emancipated.

The first inquiry is, what was the intention of the testator? It is the duty of the Court to seek diligently for that intention, and give effect to it, if it can be done consistently with the rules of law. Revised Code, 2420. We think it very clear that the intention of the testator in this case, was to provide a home for his wife during her life or widowhood, and after her death or marriage, that it should go to his two youngest sons. In execution of this design, he gave her his home place, describing it by the numbers of the lots and the number of acres. After the execution of the will he sold the home place to Kears, on a credit, and took his note for \$10,000, for the purchase money, and gave bond for titles. Soon after this sale, he executed the second codicil to his will, in which he speaks of a "certain fund" that he will have, and then states the fact of the sale of the "Home place" for \$10,000, and directs that *said sum* be reinvested by his executors in a plantation for the use of his wife during her life or widowhood, and if she married again, then the plantation to go to

has said two youngest sons, as set forth and specified in the third and fourth items of his will.

Now we think there can be no doubt that the devise of the "Home place," in the third item of the will, is a specific legacy. When the testator made the contract for the sale of the "Home place," he believed he had adeemed the legacy. And he then executed the codicil, the whole purpose of which was to set apart the \$10,000, which he was to get for the "Home place" to be used by the executors in the purchase of another plantation for his wife and sons, in lieu of the "Home place." He speaks of it as a "certain fund," which he would have, and then specifies the amount and for what he should receive it, and directs that *said sum* be used as aforesaid.

Was the legacy given by this codicil a specific legacy, of the "particular fund" which he was to receive for his "Home place," and not a general legacy of the sum of \$10,000? A gift of money to be paid from a specified sum is a general legacy. Revised Code, 2422. This was not a gift of money to be paid from a specified sum, but it was a gift of a "particular fund," not of part of it, or of a sum to be taken from it, or out of it, but a gift of the whole of "said sum," a particular fund, raised by the sale of a specific legacy, which he thought he had adeemed, and which he directed should be invested in another plantation to take the place of the one he had given his wife and sons in the third item of his will. Suppose it had become necessary that general legacies abate to pay debts, does any one who reads this will believe that it was the intention of the testator that this particular fund for which he thought he had sold the "Home place," and which he directed should be invested in another home for the widow and the two youngest sons should abate *pro rata*? This idea is expressly negatived by the testator himself in the fourth item of his will. He says:

"It is my wish and will, and I direct my executors herein named, that under no circumstances, is the property mentioned in the third item, to go towards the payment of my just debts, unless the whole of the residue of my other property shall be exhausted." The primary object of the

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testator was to furnish a comfortable home for his wife during her widowhood, and for his two youngest sons, after her marriage or death. To this object he made every other bend. To accomplish it he gave her his "Home place" as a specific legacy, which was in no case to be taken to pay debts till all the residue of the estate, not mentioned in the third item of the will, was exhausted. When he thought he had sold the "Home place" he then gave her the specific sum for which he sold it, to be used in the purchase of another home. That this is a specific legacy, see Redford on Wills, 463-5-7, part 2d; 3 Ves., 321.

But the testator was mistaken, he had not adeemed the specific legacy by a sale of the "Home place," as the purchaser failed to pay for it, and the title remained in him when he died, and still remains in the estate.

A legacy is adeemed when the testator conveys to another the specific property bequeathed, and does not afterwards become possessed of the same, or otherwise places it out of the power of the executor to deliver over the legacy. Revised Code, 2438. But if the testator attempts to convey, and fails for any cause, the legacy is still valid. See same section.

Now that is precisely this case. The testator believed he had sold the "Home place." But it turns out that he failed to dispose of it. He has not placed it out of the power of the executors to deliver it over to the widow, for the record shows that the title is still in the estate, and they offer to deliver it over to the legatees.

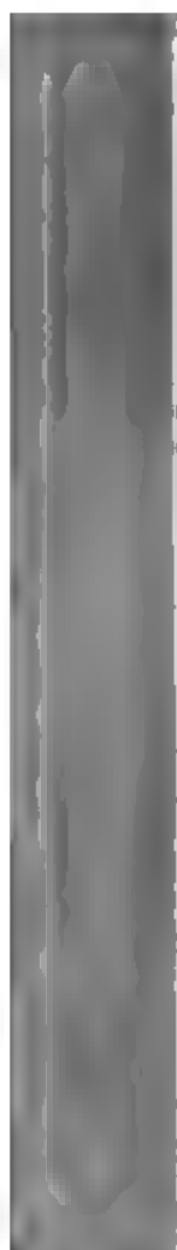
We hold that the codicil did not revoke the will, because made under a mistake. And as the "Home place" can still be turned over to the legatees under the third item of the will, and the \$10,000 has never been collected, there was nothing for the codicil to act upon.

2. If the balance of the purchase money had been paid to the executors after the death of the testator, we think the \$2,500 collected by him and used during his life time, adeemed the legacy *pro tanto*, and the executors could only have invested the remaining \$7,500, with the interest in a

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plantation for the widow and his two youngest sons, under the second codicil. Should the purchaser of the "Home place," who is admitted by the record to be insolvent, become able to pay the balance of the purchase money within the time when he can compel a conveyance of the title to him, then there will be something for the codicil to act upon, and it will be the duty of the executors to invest all the purchase money paid to them in a plantation as directed by the codicil.

Judgment reversed.



CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of the State of Georgia,

AT ATLANTA,

JUNE TERM, 1869.

PRESENT—JOSEPH E. BROWN, *Chief Justice*,
H. K. McCAY,
HIRAM WARNER, } JUDGES.

JOHN T. GIBSON, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. Penal laws are to be construed strictly *in favorem vitae*.

2. Section 4251 of the Code declares that, "Any person convicted of the offence of insurrection or an attempt at insurrection, shall be punished with death; or if the jury recommend to mercy, confinement in the penitentiary for a term not less than five nor more than twenty years."

Held, that this prescribes no penalty for the offence of an attempt to incite insurrection.

Criminal law. Insurrection, etc. Before Judge HARRELL,
Early Superior Court. October Term, 1868.

The indictment in this case charged "John T. Gibson, a free person of color, of the county and State aforesaid, with the offence of an attempt to incite insurrection; for that the said John T. Gibson, a free person of color, on the 18th day

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of August, in the year eighteen hundred and sixty-eight the county aforesaid, did then and there unlawfully and force and arms, counsel, advise and persuade, Isaac E. Ed Ryals, Henry Everett and about one hundred other persons of color, to induce them to join in combined resistance to the lawful authorities of the State of Georgia, by breaking the common jail of said county, to rescue one Charles J. Frye who was legally committed to said jail at this term of Court." The formal beginning and conclusion, etc., as required by law.

On the trial, it was shown that while Charles Frye was in jail, the defendant, a preacher, in a speech made to the parties named, was encouraging them to get Frye out of jail, that they went to the jail armed, but dispersed upon being fired upon. He was found guilty without a recommendation of mercy.

Besides a motion for a new trial, Gibson's attorney moved for a reversal of judgment upon the ground that the indictment was insufficient and uncertain, and did not charge that Charles Frye was legally in said jail for any offense known to the Penal Code of Georgia.

The Court refused to grant a new trial or to reverse the judgment, and this was assigned as error.

When the argument was opened here and Colonel Parker stated that he should contend that the judgment should be reversed, because the statute provides no punishment for the offence charged in the indictment, the Court said it would hear from the State, and no argument was had on either point.

A. HOOD, for plaintiff in error;

S. WISE PARKER, Solicitor General, for the State.

BROWN, C. J.

1. The verdict of the jury was accompanied by no recommendation to mercy, and the penalty in this case, if there be any, is death. It is a well known rule of law, that penal statutes are to receive a strict construction in favor of life.

2. Section 4250 of the Revised Code declares, that "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State, shall constitute an attempt to incite insurrection."

This does not contemplate an attempt by the defendant at insurrection, or to commit insurrection by himself, but an attempt to incite others to join in insurrection. A person may commit the offence of an attempt to incite others to join in, or to commit insurrection who neither promises nor attempts to join in it, or commit it himself. He may stand aloof entirely when it is committed, and still he may, by his influence, have incited it, and may be responsible for it.

Section 4251 of the Code, prescribes a penalty for attempt at insurrection, but none for an attempt to incite insurrection. The penalty is directed against him who makes an attempt at insurrection, as for instance, against any one of a party incited by another, who makes an attempt to commit insurrection and fails, but not against him who attempts to incite or induce others to join in insurrection, or in a combined resistance to the lawful authority of the State with intent to the denial thereof. Applying the strict rule of construction, which it is our duty to apply in this case, we have no difficulty in coming to the conclusion, that the penalty applies only to a person guilty of an attempt to commit insurrection, and not to one guilty of an attempt to incite others to commit that offence.

We respectfully invite the attention of the legislature to this defect in the Penal Code.

Judgment reversed.

Mims vs. The State of Georgia.

SAMUEL H. MIMS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The evidence in this case was clearly insufficient to support the verdict, and the judgment is therefore reversed, and a new trial granted.

Vagrancy. Tried before Judge HARRELL. Early Superior Court. April Term, 1869.

Mims was tried for vagrancy. The evidence was as follows:

WILLIAM FLOYD testified: That he was sent to defendant's house to execute an attachment, levied on a lot of land, a cart and steers, cow and calf, household and kitchen furniture, some plantation tools, several bushels of peas and some syrup; that he found a piece of bacon, about six inches long and four or five inches thick, and nearly a bushel of corn, fifteen hogs and thirteen goats. He said he had not seen the defendant for a month or two, and did not know whether he had worked or had been idle.

Mr. WILLIAMS testified: That defendant was in the habit of bringing corn to his and Stewart's mill, always bringing sufficient, and more than sufficient, for his family's use, until within a month or so; that for the last month or two, he had not brought any corn, but his family had; that he had not seen much of him lately, and knew not whether he had been idle; he exchanged plowing with him last year.

GREEN testified: That he had not seen defendant for the last month or two; had not looked for him, and did not know that he had not been at work all the time.

It was admitted that the defendant was able to work. The jury found the defendant guilty.

Defendant's attorneys moved for a new trial, upon the grounds that the verdict was contrary to the evidence, and against the principles of equity and justice, etc.

T. K. APPLING, A. HOOD, for plaintiff in error.

S. WISE PARKER, Solicitor General, for the State.

C. J.

there is no room for a doubt that the verdict is wrong, and should have been set aside. The evidence is clearly insufficient to support a conviction in this case. Not a single witness proves the defendant to have been idle for the last month, or for any length of time. They only swear that they had not seen much of him for some time, and did not know whether he had been at home. Upon such evidence as this, any citizen who remains at home, and attended closely to his business, neglecting his neighbors, may be convicted, if his neighbors have been engaged in like manner, as neither could be expected to have seen the other at work during the time he remained at home.

From the facts stated by the witnesses, the defendant has managed his property, and provided for his family, as well as other men are able to do. The judgment be reversed.

ARNER, plaintiff in error, vs. BENJAMIN WOOTTEN, defendant in error.

A sheriff is liable to rule for failing or refusing to pay over collected by him. But he is subject to the control of the sheriff, who collects money on a *fi. fa.*, and pays it over to the sheriff, and by he is, he is not liable to rule at the instance of the plaintiff after such payment. In such case the plaintiff must pursue his remedies against the sheriff.

Against sheriff. Decided by Judge HARRELL. Reversed by Superior Court. November Term, 1868.

At the November Term, 1866, of said Court, ruled that the defendant had been a deputy sheriff, for not paying the interest on a *fi. fa.* in Wootten's favor against the plaintiff, which Varner had had for collection. At

May Term, 1867, he answered, stating that the sales of Hocketter's property amounted to \$605 00, that Davis, who was sheriff, held \$355 00 of that amount, that \$103 37 was applied to costs of attachments against said defendant, and that he held the balance. At November Term, 1868, Wootten's attorney took a rule absolute (on said answer only) against Varner for \$151 63.

Thereupon Varner moved the Court that Wootten's attorney show cause why said rule absolute should not be set aside, averring the foregoing, and that since he had answered the rule he had paid Wootten's attorney \$200 00, and Davis, and not himself, was liable for the balance. For cause, he said, that he had notified Varner before Court that he would press the rule, and that when the rule was called in its order on the docket, no cause was shown to the contrary, and he took the rule absolute. He said that Varner and Davis had paid him \$350 on judgments in favor of other plaintiffs. He did not say how much each had paid.

When the matter was called for a hearing, Wootten's attorney demurred orally to the rule against him. In presenting it, he reiterated said statement of notice to Varner. In reply, Varner stated that he had heard that Court would not sit till after the Presidential election, that he wrote to an attorney to represent him in said matter, but his letter was mis-carried and therefore did not reach the attorney in time, and that he, Varner, got to the Court a few minutes after the rule absolute was taken.

The Judge, upon considering the answer and demurrer, sustained the demurrer, and allowed the rule absolute to stand. Each of these decisions is assigned as error.

B. S. WORRILL, by A. HOOD, for plaintiff in error.

W. D. KIDDOO, for defendant in error.

Taylor vs. Hardin.

BROWN, C. J.

The facts in this case show, and it was so admitted in the judgment in this Court, that Varner, the deputy sheriff, had paid over all the money collected by him. Part of it was applied to the payment of costs, and the balance was paid to the sheriff, whose deputy he was, and to the plaintiff's attorney.

In this state of the case we hold that he, as deputy sheriff, was no longer liable to rule.

By section 3883 of the Revised Code, deputy sheriffs are authorized to rule and attachment in the same manner as sheriffs. This can only apply when they have funds which they have collected, and which they have failed to pay over to the principal sheriff, or to the plaintiff.

As the deputy sheriff is subject to the direction and control of the sheriff, who is liable for his acts, we think he is bound, on the demand of the sheriff, at any time, to turn over to him any moneys which he may have collected, for which the sheriff is liable. The sheriff must necessarily exercise this control over his deputy for his own security and protection. And it follows that the deputy who has paid money collected by him to the sheriff, is no longer liable to the plaintiff, but the plaintiff in *fi. fa.* must pursue his remedies against the sheriff.

Judgment reversed.

W. TAYLOR, plaintiff in error, vs. M. A. HARDIN, defendant in error.

In a proceeding to foreclose a mortgage on a note for money lent, the defendant can not set up a claim against the plaintiff for damages arising out of a partnership which existed between them in the saw-mill business, either by set-off or recoupment, though part of the money which defendant borrowed of plaintiff was used in the purchase of mules, wagons and provisions, which defendant was to furnish in carrying out his part of the contract of partnership.

Recoupment is a right of the defendant to have a deduction from the

Taylor vs. Hardin.

amount of plaintiff's damages, for the reason that the plaintiff complied with the cross-obligations, or independent covenant under the *same contract*; and as the note given for borrowed in this case was a contract *distinct* from the partnership, the of recoupment does not apply.

Set-off, Recoupment. Tried before J. A. W. Jones, an attorney selected by the parties. Bartow Superior Court, March Term, 1869.

Taylor was foreclosing a mortgage to secure a note given by Hardin to him. Hardin set up, by way of defense, that Taylor had damaged him by his conduct in relation to running a certain saw-mill.

Upon the trial Taylor's counsel objected to such testimony, but the Court overruled the objection. John M. Payson testified: That in March, 1866, at Nashville, Tennessee, Taylor told him that he and Hardin were going to build a steam-saw-mill in Bartow county, as soon as he could go down and put it up. Taylor employed witness to go down and put up the machinery, and they went to Kingston, Georgia, leaving instructions for the machinery to be shipped as soon as possible. *En route* they met Woodcock, and, in conversation, he learned that they were to be followed by an engine and machinery for a first-class saw-mill. Woodcock took witness into the baggage room and inquired all about the engine and machinery, and then came back and offered Taylor \$6,000 00 for the engine and machinery. Taylor declined the offer. Woodcock then offered him \$7,000 00, to be paid upon delivery of the engine and machinery at Oxford, Alabama. Taylor told witness that Hardin had deceived him as to his means; that Hardin had no means, but that he was bound, in order to get rid of him, except by delaying completion of the mill till he could exhaust Hardin; this he wished to do, that he might make the sale to Woodcock. In order to do this, Taylor would employ no other workmen (except some common laborers) to assist witness, and would get a cold-water pump for the engine until all else

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ly, saying that when the machinery was opened he would find that he did not know the pump was missing, and would send several weeks by sending back to Nashville for it; and Taylor would not allow witness to make the pulley for the pump, saying that he did not wish it made till July, that he did not wish to run the mill till July. When witness quit the mill, nothing remained to be done but to make said pulley, to get the saw, and put on the belt, and the two latter was the business of the sawyer.

HARDIN testified: That he gave the note, on which the mortgage was based, to Taylor, for cash loaned to purchase horses, wagons, forage and provisions, to enable him to carry out his part of the partnership contract into which he and Taylor had entered as to said steam saw-mill; he expended a portion of the money in purchasing such things, and by the time the mill started, the mules consumed a large portion of the corn and hay, and the mules were some time idle for the same reason, as Hardin was to haul the timber and the lumber away from the mill; he delivered a large quantity of timber to the mill.

It was admitted that Taylor was a non-resident and insolvent. The Judge charged the jury that they could consider unpaid damages as set-off, and that if they believed Taylor had damaged Hardin, they should so find. The jury found for Hardin \$439 92, the amount of his account and \$100 damages, with interest on the account from 1st Jan., 1867, and on his damages from 1st of August, 1866, for the plaintiff \$484 00, with interest and costs of suit. At the record was, and what other testimony was given upon which this strange verdict was rendered, did not appear, as the cause came up without a record, and upon statement of testimony already given.

Taylor's counsel say that the Court erred in admitting Taylor's testimony, and in his charge to the jury, and that the verdict is contrary to law.

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W. T. WOFFORD, for plaintiff in error, cited Irwin's Code, secs. 2858, 2859, 2861, and Sedg. on Dam., 448, as to set-off and recoupment.

A. JOHNSON, D. A. WALKER, for defendant in error, cited Irwin's Code, secs. 3010, 3018-19, 3185, 2906, 2900, 2902-3-4, as to damages resulting from fraud; secs. 3210, 2217, as to attachment for ~~loans~~; 3026-7 and 3084, as to equitable powers of Courts of Law, and 2858, 2861, as to recoupment.

BROWN, C. J.

1. The bill of exceptions and facts agreed upon as the material parts of the record in this case, show that the partnership transactions between plaintiff and defendant were distinct from the loan of money, to secure which the mortgage was given by Hardin. It is true, he says he expended most of the money which Taylor loaned him for horses, wagons, provisions, etc., to enable him to carry out his part of the partnership agreement. The use to which he applied the money in no way changes the nature of the two contracts, or connects them together as one transaction. If Hardin was bound by the contract of partnership to furnish timber to be sawed at the mill, and to haul it to the mill, and the lumber from the mill to the railroad, and he borrowed money of his partner, which he used in the purchase of mules, wagons, and other necessary supplies, to enable him to carry out his contract with his partner, this loan was as distinct from the partnership as if he had borrowed the money from a third person. The two contracts being distinct, we are of opinion that Hardin could not set up a claim for damages which he alleges were due him by his partner in the partnership business, against plaintiff's claim for borrowed money, by way of set-off or recoupment.

2. It was not seriously contended in the argument that Hardin was entitled to set-off his damages against the note given for the borrowed money. But it was urged by the learned counsel that he was entitled to set up the damages by way of recoupment. We do not so understand the law.

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Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross obligations or independent covenants arising under the ~~same~~ contract. See Revised Code, section 2858. And it may be pleaded in all actions *ex contractu*, where from any reason the plaintiff under the same contract is in good conscience liable to the defendant. Section 2861.

This was an action *ex contractu* upon a contract *distinct* from the contract of partnership, and the defendant was not entitled by way of recoupment to set up a claim for damages growing out of the partnership business.

Judgment reversed.

WILLIAM F. MATTOX, plaintiff in error, vs. JOHN EBERHART, administrator, etc., defendant in error.

Where the testator directed that all his property be kept together during the widowhood of his wife, to be used for the support and maintenance of his wife and the education of their minor children, and that his executors give off to each of his minor sons, as they might come of age, and to his daughters, as they might come of age or marry, about thirty-one or two hundred dollars in money or property, as may be most convenient to the estate, and most suitable to the party receiving property; and in order to enable his executors the more conveniently to carry out the foregoing objects, he thereby gave them power to sell any of the property and to buy or to exchange for other property, taking care to give a statement and history of all such sales, purchases and exchanges, to the Court of Ordinary: *Held*, that it was the intention of the testator to give the executor power to sell at private sale, and that such sale by him, if fairly and honestly made, conveyed a good title to the purchaser.

Ejectment. Tried before Judge ANDREWS. Oglethorpe Superior Court. October Term, 1868.

This was ejectment by John Eberhart, administrator, *cum testamento annexo*, of Nathan Mattox, against William F. Mattox.

Mattox vs. Eberhart, adm'r.

The plaintiff read in evidence the will of Nathan Mattox, dated 29th of January, 1857, showed that the testator died in 1862, showed title to the premises in testator at his death, and that defendant was in possession of them when this action was brought, proved the value of the rent, and closed.

The will contained nothing pertinent to this matter, except its fourth item, which was as follows: "After the foregoing, I will, desire, and direct that my executors, hereinafter named, keep all my property together, for and during the widowhood of my wife Lucy, to be used for the support and maintenance of my said wife and our children, and I direct that my executors give off to each of my sons, who are under age, as they may respectively arrive at the age of twenty-one years, and to my daughter as she may come of age or marry, about thirty-one or thirty-two hundred dollars, in money or property, as may be most convenient to the estate and most suitable to the party receiving the property; and in order to enable my executors the more conveniently to carry out all the foregoing objects of this item, I hereby give them power to sell any of my property and to buy or to exchange for other property, taking care to give a full statement and history of all such sales, purchases and exchanges in their return to the Court of Ordinary." Thomas J. Mattox and John Henry Mattox were nominated as the executors.

The defendant offered in evidence a deed dated November 19th, 1863, made by said nominated executors, conveying said premises to himself, which deed showed that the sale by them to the defendant was a private one. Plaintiff's attorney objected to this deed upon the ground that a private sale was not allowed by said will, under the law. The Court sustained the objection. Plaintiff had a verdict and judgment for the premises and the rent proven.

The rejection of said deed is assigned as erroneous.

R. TOOMBS, MATTHEWS & REID, for plaintiff in error, cited *Bond et al., vs. Zeigler*, 1 *Kelly's (Ga.) R.*, and said section 2526 of Irvin's Code could not affect this case, that

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that section was not retroactive. *Pierce vs. Chapman*, 31 *Ga. R.*, 674; *Bass vs. Ware*, 34 *Ga. R.*, 386 (1).

A. T. AKERMAN, for defendant in error, said unauthorized sale by administrator does not pass title. *Clements vs. Henderson*, 4 *Ga. R.*, 148; *Worthy vs. Johnson*, 8 *Ga. R.*, 236; 8 C., 10 *Ga. R.*, 358. This sale was unauthorized. Code, secs. 2312, 2514, 2518, 2519, 2520, 2526; 2 Peter's R., 492.

BROWN, C. J.

Under the law of this State, as it existed prior to the adoption of the Code, an executor had the right to sell the property of the testator at private sale, when the will authorized a sale, without prescribing how it should be made. And in such case, if the sale was fairly and honestly made, the title passed to the purchaser. 1 *Ga. Rep.*, 324.

Section 2526 of the Revised Code changes this rule. Under this section the executor can not sell at private sale, unless the will authorizes a sale in that manner. If the will directs a sale without specifying in what manner it shall be conducted, the direction of the will stands in the place of the order of the Court of Ordinary, authorizing such sale, and the subsequent proceedings must be the same as the law requires in case the property is sold under the order of said Court.

The question in this case is one of intention. Did the testator intend to clothe the executors with power to sell at private sale? We think he did. In providing for the distribution among his children when the sons came of age, or the daughters came of age or married, he directed that each have \$3,100 00 or \$3,200 00 in money or property, as may be most convenient to the estate and most suitable to the party receiving it; and to enable his executors to carry out the foregoing objects, he gave them power to sell any of the property, or to *buy or exchange* for other property, taking care to give a full statement and history of all such sales, purchases or exchanges, to the Court of Ordinary.

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Now it seems very evident that the testator intended that the executor should select such property for each legatee as would be convenient and desirable, as far as it could be done, consistently with the interests of the estate. If he found a tract of land, for instance, that suited, and was desired by one of the legatees, he might sell property of the estate to raise money to purchase it, or he might exchange a tract of land or other property of the estate for it. From the very nature of the transaction, it is evident that the testator did not expect, or intend, that such an exchange, which is in fact a sale of one thing for another, should be made at the Court-house door, after the advertisement, and in compliance with the forms prescribed by law, in case of public sales.

This view of the case is strengthened by the requirement of the testator, that the executor should give a full statement and history of all such sales, purchases and exchanges, to the Court of Ordinary. It is true the law requires the executor to make a return of his public sales to the Court of Ordinary. But the language of the testator, which requires the executor to give a full statement and *history* of the sales, purchases, or *exchanges* made by him, seems to contemplate more than the common return made to the Court of Ordinary. He had clothed his executors, in whom he had full confidence, with large and plenary powers to act in advancing and settling his children when they came of age, as he would have acted had he been in life. And as he had given them these ample powers to represent him after his death, he required them to keep up, not only a statement, such as is commonly made upon the Ordinary's books, but he also required them to place upon the record a history of their actings and doings in the premises.

Let the judgment be reversed.

Jordan vs. The State of Georgia.

REW JORDAN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

A penalty for the crime of Burglary was changed by the Legislature between the commission of the crime by the defendant in this case and the time of his trial: *Held*, under section 4570 of the Revised Code, that the defendant was properly prosecuted and punished under the laws of force at the time the crime was committed.

The evidence in this case was sufficient to maintain the verdict of the

burglary. Motion for new trial. Before Judge WORRILL. Georgia Superior Court. November Term, 1868.

The indictment charged Jordan with having broken into the store-house of Clements & Tillman, during the night of the 10th of September, 1868, with intent to steal therefrom goods therein kept. He was arraigned for trial in December, 1868. Jordan's counsel moved to quash the indictment upon the grounds that by the Act of the 5th of October, 1868, "the law of burglary in the night had been changed." The position was, that he could not be tried under the law in force on the 10th of September, 1868, because it was repealed, and could not be tried under the new law because it, in this case, was *ex post facto*. The Court overruled the motion.

The evidence showed, that during the night of the 10th of October, 1868, said store-house was broken open by prying open the cellar door and then prizing up planks nailed across an opening in the floor; that some hams, bacon, sugar and sacks were taken from it.

The evidence to fix it upon Jordan was as follows: Lights of an hand-cart approaching the store and heavier lights of it going from the store were found. The tracks were traced to the house of one Swift, who owned such a cart.

There information was had that Jordan, on the night of the 10th, about three o'clock, came and borrowed the cart, saying he wished to carry home one who had been shot. The tracks were then traced to Jordan's house and there the cart was found behind the smoke-house, with salt and grease on

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it, and in Jordan's rooms, and in another, of which Jordan's wife had the key, said articles were found concealed, and had the names and marks of Clements & Tillman on them. It was shown that four or five persons came there a few hours before day, on said night, with said cart, and that the person shot was shot about midnight and carried off in an express wagon.

The jury found Jordan guilty, recommending that he be imprisoned in the penitentiary for life, at hard labor. His counsel moved for a new trial upon the grounds, that the Court erred in refusing to quash the indictment, and because the verdict was contrary to the evidence. The refusal of a new trial is assigned as error on said grounds.

RAMSEY & RAMSEY, WILLIAMS & THORNTON, for plaintiff in error.

CAREY J. THORNTON, Solicitor General for the State, cited Irwin's Code, sec. 4570; Gibson vs. The State, 35 Ga. R., 224; Brown vs. The State, Ib., 232.

BROWN, C. J.

1. Under sections 4222 and 4257, of the Revised Code, the punishment for burglary in the night, was death, unless the jury recommended the defendant to mercy; in the latter case he was to be punished by confinement in the penitentiary for life. This was the law in existence at the time the crime was committed by the defendant in this case. But prior to the term of the Court, when he was put upon trial, the legislature changed the penalty to imprisonment in the penitentiary for any time, not less than five years nor longer than twenty years.

On the trial, the defendant denied the right of the Court to try and punish him, under the law in existence at the time of the commission of the crime, because the law of the penalty, as it then existed, had been changed and was no longer of force, or under the law in existence at the time of the trial, because it was *ex post facto*. The Court overruled

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objection and put the defendant upon his trial, and they found him guilty, but recommended him to mercy, and Judge sentenced him to the penitentiary for life. That judgment is brought up for review.

Section 4570 of the Revised Code, declares that: "All crimes and offences committed shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offence, notwithstanding the repeal of such laws before such trial takes place. This section of the Code has already been before this Court, in the case of *Gibson vs. the State*, 35 Ga., 224, and it was held that the defendant was to be punished under the law as it existed when the crime was committed. The question is *res adjudicata* and we have no fault to find with the decision.

2. The remaining exception is taken to the ruling of the Court below, in refusing to grant a new trial, on the ground that the verdict was not sustained by the evidence. We overrule this exception. If the evidence was not conclusive it was so clearly and strongly in favor of the guilt of the defendant as to leave no room for a reasonable doubt. He did not even pretend to make an explanation of it. Nor did he produce the slightest evidence to relieve himself from its crushing weight.

Let the judgment be affirmed.

H. & T. M. WHITE, plaintiffs in error, vs. THE NEWTON MANUFACTURING COMPANY, defendant in error.

When a motion for a new trial was made in the Court below, which was granted, and that decision is brought, by writ of error, to this Court, a brief of the oral, and a copy of the written evidence adduced in the Court below, must be embodied in the bill of exceptions, or attached thereto as an exhibit, when presented to the Judge for his certificate, and identified by his signature on the same as a true copy, and constitute a part of the same, or the writ of error will be dismissed.

In a motion for a new trial, a brief of the evidence agreed upon by the parties, and approved by the Court without such agreement, in case

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they fail to agree, must be filed in the Clerk's office. But such brief of evidence constitutes no part of the record, and need not be recorded by the Clerk, and as it is embodied in the bill of exceptions, should not be embraced in the copy of the record sent up to this Court.

8. The record in a case in the Superior Court, consists of the declaration, process, return of service by the sheriff, and other official entries, plea, verdict, judgment, and all interlocutory orders passed by the Court during the pendency of the case, and in case of a motion for an order *nisi*, and an order granting or refusing a new trial, together with any order passed by the Court, setting it down for a hearing in vacation, or adjourning the hearing from time to time, and in case a new trial is granted, all subsequent orders passed by the Court, including the final judgment.

Motion to dismiss bill of exceptions.

The bill of exceptions recited that an action of assumpsit in favor of plaintiffs in error against defendant in error, was tried before Judge JAMES M. GREEN, in Newton Superior Court, resulted in a verdict in favor of plaintiffs in error, and they moved for a new trial; that after several postponements, by consent, and "after perfecting a brief of the testimony," and argument had, a new trial was granted upon the grounds, "1st. That the testimony of Clem. Johnson having been erroneously taken upon an important point, for the consideration of the jury, which might have controlled the finding of the jury. 2d. That the Court erred in allowing proof of the declarations of Davis, the agent, two years after the declarations were made as part of the *res gestæ* at a different time and occasion," and this grant of a new trial is assigned as error.

There is no other allusion to the testimony in the bill of exceptions. The motion for new trial was based on the allowance of certain sayings of said Davis as evidence, and various other grounds as to the admission and rejection of evidence, and because of a discovery that Johnson's testimony, by interrogatories, was incorrectly stated, by mistake; because the verdict was contrary to the evidence and charge of the Court, and because the Court erred in several charges, based on the evidence in the cause. The Clerk, with this motion, sent up a copy of what purports to be a brief of the

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ence in said cause. It purports to contain a statement of evidence alluded to in the motion. This paper ends as follows:

We agree that the foregoing brief is full and correct,
—— day of December, 1868, with the amendments
ordered by the Court.

JOHN J. FLOYD, for defendant.

W. W. CLARK, C. PEEPLES, Attorneys.

Following this are two other pages sent up by the Clerk, running: "Hugh White testified also," etc., making other statements as to what was proved on the trial, and ending with, "Ordered by the Court that the three sheets attached be added to the brief of evidence as part thereof."

JAMES W. GREEN, J. S. C., F. C."

Following this, in the order in which the Clerk sent up papers, are copies of an affidavit by Johnson, stating that the mistake as to a material date was made by the commissioners who took his testimony, of an affidavit by the commissioners of the same effect and an affidavit by Phillips, the person principally interested and conducting the defense, that he did not discover this mistake till after the trial. An order of the Court shows that the new trial was granted on the grounds stated in the bill of exceptions. The Clerk certified that what he sent up with the bill of exceptions contained "a true and correct transcript of the records and papers of file" in the office in said cause.

Counsel for defendant in error, moved to dismiss the bill of exceptions, because the evidence was not embodied in it. His argument counsel for plaintiff in error moved to amend the bill of exceptions by detaching the copy of the evidence from the record and attaching it to the bill of exceptions. This was not allowed. The bill of exceptions was then dismissed. Upon a subsequent day, by leave granted, counsel for plaintiff in error moved to reinstate the cause and again argued it. The Court refused to reinstate it.

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JOHN J. FLOYD, HAMMOND & MYNATT, for the p
relied on *O. & A. Wetmore vs. Cheavers*, 9 Ga. R., 546

CLARK & PACE, PEEPLES & STEWART, *contra*.

BROWN, C. J.,

The rule of this Court from its organization has re
that a brief of the oral and a copy of the written ev
adduced in the Court below, must be embodied in the
exceptions; and the most liberal construction which
place upon this rule of Court is, that if not literally em
in the bill of exceptions, it shall be attached thereto
exhibit, when presented to the Judge for his approv
certificate, and be identified by his signature on the a
a true copy. The better practice is to embody it in t
of exceptions.

But we are asked why it will not serve the same p
to attach the copy of the evidence to the record, wh
certified and sent up by the Clerk. Justice to the
Judge and to the Judges of this Court alike require
accompany the bill of exceptions as required by the
When the motion is made for a new trial; and the
of the evidence is approved by the Judge, it is requir
the rule of the Superior Courts to be *filed* in the C
office. The Judge of the Superior Courts cannot
pected to recollect thirty days after the hearing of
motion, all the facts stated in the brief of the evide
filed, in all the cases that may have come before him
the term. The bill of exceptions may be presented
on the thirtieth day, in another part of the circuit, wh
cannot have access to the evidence of file in the Clerk's
of the county where the case was tried. In determinin
correctness of the bill of exceptions, on points which
to the evidence, it may be absolutely essential that be
the evidence before him, to enable him to refresh his m
lection by reference to it. If it is not attached to the bill
exceptions he is denied this right, which may be very es

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im and to the parties litigant, as in the absence of
lence, he may, by mistake, sign and certify a bill of
ns, which does not fairly present, for the decision of
rt, the points ruled in the Court below.

Justice to the Judges of this Court requires that
Judge who has to pass upon the case shall have a copy
vidence in the case before him in his office, that he
able to read the points in the bill of exceptions in
on with it. It may frequently happen that the Court

unanimous in opinion in deciding on a motion for a

1. The Judges reside in different parts of the State.

Judge who delivers the opinion of the majority of the

entitled to the record, which, under the practice

to be established, would contain the evidence. But

if of it accompanies the bill of exceptions, neither the

Judge nor the one who writes the concurring

has the evidence before him in writing out his opin-

on the very question may be upon the sufficiency of the

It is clear, therefore, that the rule should require,

a Judge should be furnished with a copy of the whole

in the case. If the rule of law made it part of the

and required it to be sent up with the record, it would

uty to ourselves and to the parties to compel counsel

h each Judge with a copy of the record, as well as the

ceptions, before the case is heard in this Court. This

red in the Supreme Court of the United States,

the copies of the record are printed at the expense

overnment. But the briefs of counsel, which are also

to be printed, are furnished at the expense of the

The only objection to the rule we lay down is, that

he attorney bringing up the case a little more labor

the evidence with the bill of exceptions, in preparing

the Judges and the Reporter, as required by the

the Court. This we regret, but the ends of justice

it, and the labor is not so great as it would be if the

isted upon were adopted, as we should then be com-

o require that he also make out a copy of the record

h member of the Court. This would be much more

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convenient for the Judges but is not indispensable, so long as the bill of exceptions contains a copy of the evidence in the Court below.

There is still another good reason for the rule. Our daily observation is that the Clerks of the Superior Courts, are frequently too careless in copying the record, and admitted inaccuracies are frequently found in it by the counsel themselves. The same may be true in copying the evidence to send up with the record. As all know; the change or omission of a single word, may change the whole meaning, and cause us to pronounce a judgment different from the one which would be rendered if the evidence were before us as it was before the Court below. How important it is then that the copy of the evidence as it is to come before us, should undergo the examination and strict scrutiny of the Judge of the Court below, when he signs the bill of exceptions.

2. But it was insisted by the learned counsel for the plaintiff in error, that the brief of the evidence, as approved by the Court in a motion for a new trial, should be recorded by the Clerk as part of the record, and, as it properly comes up as part of the record it need, not be embodied in the bill of exceptions. And our attention is called to the Act of 1856, which makes it unnecessary to copy into the bill of exceptions any part of the record.

We do not agree with the counsel that it is any part of the record. The rule of the Superior Court as already stated requires that it be *filed* in the Clerk's office, but not that it be recorded. We think such a practice would be a very inconvenient and a very unnecessary one. There may be twenty sets of interrogatories in a case, and as many witnesses sworn on the trial. A motion is made for a new trial, and the rule requires that a copy of all the written evidence, the interrogatories included, with a brief of the oral, be filed in the Clerk's office. We see a good reason for this rule. Indeed it is indispensably necessary. But what possible reason exists why all this large mass of evidence should cumber the record in the case? Why should the Clerk enter it upon the minutes, with the order *nisi*, for a new trial? As

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n illustration: By reference to the record in this case now before me, I see the copy of the evidence occupies sixty-nine pages. Can there be a good reason why the parties should be taxed with the cost of placing all this evidence, which is not to be filed in the proper office, upon the record, or why it should constitute part of it?

3. We are referred to the 5th paragraph of section 256 of the Code, which makes it the duty of the Clerk of the Superior Court to record all the proceedings relating to the suit. This we think does not embrace the evidence given in on the trial. If so, it would be necessary for the Clerk in all cases to take down the oral evidence on the trial, and record it as part of the proceedings. The proceedings which the Clerk should record, and which make up the record, are, the declaration, process, return of service by the sheriff, and other official entries, the plea, verdict, judgment, and all interlocutory orders passed by the Court during the pendency of the case; and in case of a motion for a new trial after verdict, the order *nisi*, together with any order passed by the Court, setting it down for a hearing in vacation, or adjourning the hearing from time to time; and in case the new trial is granted, all subsequent orders passed by the Court, including the final judgment.

A motion was made to amend the bill of exceptions by taking from the record the copy of the evidence and annexing it to the bill of exceptions. The law authorizes the bill of exceptions to be amended in the Supreme Court, so as to conform to the record. It is a motion to take from the record a copy of what purports to be the evidence in the cause, and which constitutes no part of the record, and annex it to the bill of exceptions, so as to perfect it without the sanction of the Judge below, or anything from him showing that the evidence is properly copied, or that the bill of exceptions, with the copy of the evidence proposed to be annexed, is in fact true.

We would remark, in conclusion, that as the evidence forms part of the bill of exceptions, and comes up with it, the Clerk should not annex a copy of it to the copy record sent up by him. Let the case be dismissed.

Reid & Brother vs. Spencer.

REID & BROTHER, plaintiffs in error, vs. A. S. SPENCER,
defendant in error.

1. When a case was tried, and a verdict rendered in favor of the plaintiff, and a motion was made for a new trial, and the Judge who heard the case went out of office before the motion was disposed of, and no brief of the evidence was agreed upon by the parties, or approved and certified by the Judge to be correct: *Held*, that the Judge who succeeded to the bench committed no error in refusing to grant a new trial.
2. A brief of the oral, and a copy of the written evidence, adduced in the Court below, must be embodied in the bill of exceptions, as certified by the Judge, or the case will be dismissed on the hearing in this Court.

Motion to dismiss bill of exceptions, from Troup Superior Court. November Term, 1868.

Spencer sued Reid & Brother for certain money alleged to have been paid out by him at their request. They plead the general issue, etc. The jury found for Spencer. Counsel for Reid & Brother made a motion for a new trial upon the ground that certain rulings and charges of the Court were erroneous, and because the verdict was contrary to law, to the evidence, etc. These grounds were such as depended upon the evidence in the cause. This motion began, "a correct brief of the evidence having been filed and a motion for new trial made, plaintiff's attorney is ordered to shew cause," etc. Service of this motion was acknowledged, and it was filed in office on the 27th of November, 1868. Judge Collier was then presiding. He went out of office and was succeeded by Judge Pope. The motion came on for hearing before Judge Pope, and he refused a new trial, upon what ground does not appear by the record.

The counsel for Reid sued out their bill of exceptions, assigning that Judge Pope erred in overruling said motion on each of the grounds stated therein. In sending up the record the Clerk attached a copy of a paper headed "Brief of evidence," purporting to give all the evidence had on the trial, and also another paper purporting to be the testimony

Reid & Brother vs. Spencer.

of Spencer on said trial. To this second paper the Clerk had put the following remarks: "The above is a brief of testimony prepared by B. C. Ferrill, and returned to office by Judge Collier, with the other testimony in this cause. Judge Bigham suggested that it should not be certified and sent up, while Judge Ferrill claimed that it should accompany the remainder." These papers as shown by the record were not signed by counsel, nor had on either of them any approval by Judge Collier or Judge Pope, nor any entry of filing in office.

The bill of exceptions recited that this was "a motion for a new trial on the several grounds of error alleged in the rule nisi which was granted and which is of record with the brief of evidence" * * * and counsel "refer to said rule nisi as a part of this bill of exceptions." But no part of the evidence was set out in the bill of exceptions and because it was not, counsel for Spencer moved to dismiss the bill of exceptions.

FERRILL, HAMMOND & BROTHER, for movant cited 1 *Kelly, Ga. R.*, 260; 2, 263; 3, 383; 7 *Ga. R.*, 263; 9, 546; 10, 1; 13, 495.

B. H. BIGHAM, B. H. HILL, for Reid & Brother.

BROWN, C. J.

1. The counsel for the respective parties in this case, agreed upon no copy of the evidence given in upon the trial. Each submitted a paper as part of the evidence. The Judge who tried the case went out of office without deciding between them, and returned the papers to the Clerk's office, without having revised and certified either of the bundles of file, as the evidence in the case.

At the next term of the Court, Judge Pope, who succeeded Judge Collier upon the bench, was asked to grant a new trial, which he refused. The ground upon which his Honor placed his decision does not appear by the record. But, in the shape in which the case comes up, we see no error in the judgment

refusing the new trial. The Judge presiding at the hearing of the motion could not know what the evidence was upon the former trial, and it was his duty not to interfere with the verdict without such knowledge.

2. We are obliged to sustain the motion to dismiss this case. No brief of the oral or copy of the written evidence, given in upon the trial, is embodied in the bill of exceptions, or annexed thereto as an exhibit, and identified by the Judge of the Court below as correct. The rule that requires this is a salutary one, without the enforcement of which, this Court will be greatly embarrassed in the decision of all cases of this character.

We have given elsewhere at this term more fully, the reasons for the enforcement of the rule. (See last case *ante*.) And after hearing the question argued more than once, we are satisfied that the rule we adhere to, is sustained by the former decisions of this Court, and is in conflict with no statute now of force in this State.

Under this rule, no part of the record should be embodied in, or attached to the bill of exceptions. But the copy of the evidence of file on the motion for a new trial, (which is no part of the record,) should come up with the bill of exceptions as part of it, and not with the record.

We will remark that neither the Code nor the rule of Court requires any more of the evidence to be sent up in any case, than is material to a clear understanding of the errors complained of. Generally in motions for new trial, all the evidence is necessary to a clear understanding of the case in this Court. But there are exceptions to this rule. Counsel should look well to it, however, that the case clearly falls within one of the exceptions, before they omit the evidence in making out the bill of exceptions. If the plaintiff in error excepts to the ruling of the Court upon a naked question of law, which was material to the case made in the Court below, which can be as well understood without reference to the evidence, as for instance, that part of the jurors who tried the case were not competent, and that the fact was not known to plaintiff in error till after the trial,

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This would form an exception to the rule, as the evidence given in upon the merits of the case could be of no assistance in understanding the point made.

Let the writ of error be dismissed and the judgment of the Court below stand affirmed.

[NOTE.—Lawrence Rooney vs. John I. Grant & Co., from Muscogee, and B. H. Bigham vs. Nicholas Hutchins and John Billingslea, from Harris, were dismissed for the same reason. Motion having been made to dismiss Plant & Cubbedge vs. The Enfaula Home Insurance Company, from Bibb, and John W. Clarke vs. John T. Napier, from Houston, on the same ground, the records were withdrawn by counsel for plaintiffs in error. The same motion was made in L. G. Chambliss vs. D. Phelps, from Monroe, and in one or two other cases, but was overruled because they were not within the ruling of the Court.

James W. Wilkinson vs. Martha G. Christy, motion for new trial from Lee, was dismissed because counsel had agreed to have the cause argued here on the original evidence used below, and had not brought that evidence here.—REPORTER.]

ROE, casual ejector, and NICHOLAS HIGHTOWER, tenant, plaintiffs in error, vs. DOE, ex dem., of JESSE WILLIAMS, et al., defendants in error.

1. A deed unrecorded can not be given in evidence as color of title without proof of execution.
2. When both parties derive title from the same person, plaintiff in ejectment need not show title into such person.
3. A purchaser at sheriff's sale, under a mortgage *fi. fa.*, will be protected when the rule absolute shows upon its face, that the rule *nisi* was served upon the mortgagor according to law.
4. Service, in such case, acknowledged by a general agent, without special authority, will be sufficient to protect the purchaser at sheriff's sale, in an action of ejectment, when the plaintiff in ejectment, who purchased from the mortgagor after the date of the mortgage, was in Court when the rule absolute was taken, and made no objection.

Ejectment. Tried before Judge HARRELL. Early Superior Court. April Term, 1869.

This was ejectment for a town lot in Blakey, being part of land lot No. 154 in the 28th District of said county, and

Hightower vs. Williams.

for other forty acres of lot No. 166, same district, upon the demises of Thomas J. Rowe, *et al.* There was a distinct case for each lot, but the title and defence being the same, they were tried as one below, and came as one to this Court. R. W. Wade, as administrator of S. S. Stafford, deceased, had been made a party defendant. On the trial, Jesse Williams testified that he took possession of the premises under a purchase from Rowe, at the time the deed was made. Green, sheriff, at March sales, 1867, sold the lot to Stafford. Rowe had been in possession about a year before, and Major West was in possession at the time of the sale as witness' tenant. He paid witness rent up to the date of the sale. Williams bought the place without knowledge of the mortgage from Rowe to Stone. At the end of the year Hightower took possession as Stafford's tenant, and Stafford's tenant had been in possession ever since said sale. He testified further, that it was worth, for rent, \$150 00 *per annum*. The plaintiff then read in evidence a deed from Rowe to Williams for said lot, dated 2d of October, 1862.

James B. Jones was shown a deed from himself as trustee to John W. N. Stone for said forty acres of land, the Fryer lot, and testified that he bought it from John V. Heard, that he did not know what became of the deed, supposed some of the parties had it. He got fire-wood from it and exercised control over it till Stafford bought. He thought that after Williams bought it, there was a brick-yard on it. Plaintiff read in evidence a deed from said Stone to said Rowe, dated 21st of October, 1861, for said four acres, and a deed from James B. Jones, trustee, to said Stone, dated 1st of July, 1861, for the Fryer lot.

JOHN W. N. STONE testified: that he was in possession of the house and lot four or five years; bought it from Sapp; Rowe was in possession about a year, and sold to Williams. Plaintiff's attorney handed him a deed; he said that * the deed was in his hand-writing; * that he knew the witnesses to the deed, W. C. Hainesley and his wife; Hainesley is dead; his wife lives in Calhoun county; that after buying the forty acre lot he exercised no acts of ownership over it,

Hightower vs. Williams.

apt perhaps getting a little wood from it; * the deed from p to him was signed by said witnesses in his, (Stone's,) ence,* but he did not know the hand-writing of the witnesses; * he went into possession under said deed from Sapp*. o much of said testimony as is between the * * came in the defendant's objection. Plaintiff's attorney then tendered said deed from Sapp to John W. N. Stone, trustee, and in 1855, witnessed thus:

"W. G. HAINSLEY, J. P. EMMA ^{Her} ~~X~~ _{mark} HAINSLEY."

his deed had never been recorded. Defendant's attorney objected to it till it was proven by one of the subscribing witnesses. The Court allowed it read, without proof, as color title. The absence of the original papers being accounted for, the plaintiff's attorney read in evidence, from the minutes of the Court, the rule nisi and rule absolute for foreclosure of a mortgage made by said Rowe to said Jones. The rule absolute was taken at October Term, 1866, and recited that he gave Stone a note for \$625 00, dated the 21st of October, 1861, and due on the first day of the next January, and thereupon gave his mortgage on said two lots, on the same day, to secure the notes, that said rule nisi was granted, and a copy of said rule having been served on the said Thomas Lowe, according to law." Here plaintiff closed.

The defendant's attorney then read in evidence the original mortgage from said Rowe to said Stone on said lots, dated 21st October, 1861, and recorded 21st of November, 1861, the mortgage *fi. fa.*, the levy thereon and the sale of said property, under said levy at sheriff's sale to said Stafford, the deed from Green, sheriff, to Stafford for the premises, according to said sale, and closed.

Plaintiff's attorneys, in rebuttal, introduced T. T. Swan, who testified that * he thought that when the rule absolute was taken, Rowe had left the State; * that Williams knew of the mortgage; that witness let him have the notes to try to redeem himself by attachment; that Williams was present and was when the rule absolute was taken, and made no com-

plaint to witness; that he was satisfied that the service was considered sufficient when the rule absolute was taken; that no order for publication of the rule was taken by witness, and he was the sole attorney for Stone.

JAMES B. JONES testified: that he knew Rowe;* he left the State before the rule *nisi* was granted; moved to Arkansas in the fall of 1865; he, witness, acknowledged service of the rule *nisi*, without having been authorized so to do by Rowe. * Upon cross-examination, he said that he acknowledged the service to save costs of publication; that Rowe was partner in the firm of J. J. Williams & Company; Williams was dead; Rowe was the sole surviving partner, and the business of the firm was left with witness, as the agent of Rowe; he signed Rowe's name to the matters of the firm; collected some costs due Rowe as late sheriff; paid some debts due by Rowe, out of the assets of said firm; that he signed the acknowledgement of service, as agent of Rowe; that he wrote many letters to Rowe; told him of the rule *nisi*, and of the sale, but all his letters but one came back from the dead-letter office; he did not know whether that one informed him of said acknowledgment; did not know that Rowe knew it. So much of the evidence as is between ** came in over the objection of defendant's attorney.

The evidence being closed, the Court charged the jury: 1. The great question in this case is, was the mortgage properly foreclosed? The whole case hinges on that fact. If not served as directed by the Code, it was no service. While Rowe could adopt it or not, could ratify or disapprove of the act of Jones, yet it could not bind the rights of third parties; that before Jones could acknowledge service he must be specially appointed for the purpose, i. e., to acknowledge service of the rule *nisi*, and if the jury shall find, from the evidence, that Jones was not specially appointed the agent or attorney of Rowe, to acknowledge service on this rule *nisi*, then there was no legal service, and the judgment was a nullity so far as it affects the rights of third parties, and the purchaser at sheriff's sale could acquire no right under the sale, and the plaintiff must recover. .

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2. If both parties claim under Rowe, it was unnecessary for the jury to investigate the title beyond Rowe, as neither party could dispute Rowe's title."

The jury found for the plaintiff the premises in dispute, with \$208 33 for mesne profits. The defendants' attorneys moved for a new trial upon the grounds that the Court erred in admitting the evidence objected to by them, in admitting the deed from Stafford to Stone, as a color of title, in each branch of his charge, and because the verdict was contrary to the evidence, etc.

The motion was overruled, and this is assigned as error on each of said grounds.

HOOD & KIDDOO, for plaintiff in error, said the subscribing witness to the deed should have been examined, 20 Ga., 312; 24 Ga. R., 343. Parol evidence inadmissible to contradict a record, *Dudley*, 255; 1 *Kelly* (Ga. R.) 485; 3 Black Com., 24; 15 Ga. R., 557; as to foreclosure of mortgages, Code, section 3886. Judgments *in rem* are conclusive against everybody, Code, section 3774, and if judgment is not voidable, *bona fide* purchaser gets good title by sale under it. 4 Ga. R., 89, 323; 20 Ga. R., 90, 581; 24 Ga. R., 445; 23 Ga. R., 168. A judgment not void on its face can not be collaterally attacked. 6 *Humphreys*, 444; 4 *Hibb*, 336; 2 *Iowa*, 95, 192; 2 *Howard* U. S., 340, 341; Code, section 3700; 10 *Peters*, 433-4-5-6; 2 *Peters*, 168; *Peters*, 202; 3 *Cranch*, 305; *Macnamara* on Nullities, 31-3. *Phillips* on Ev., Cowen's notes, (4) 126.

FIELDER & POWELL, for defendants in error.

BROWN, C. J.

After a careful examination of the record before us, we lay down the following legal propositions which we think are applicable to, and control this case.

1. A deed which has not been recorded can not be given in evidence as color of title without proof of its execution.

2. When both parties derive their title from the same per-

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son, plaintiff in ejectment need not show title in such person.

3. In a proceeding to foreclose a mortgage on real estate, the Superior Court of the county where the land lies has jurisdiction of the subject matter, and a purchaser at sheriff's sale, under a judgment of foreclosure, now claimed to have been without service, will be protected, when the rule absolute shows upon its face, that a copy of the rule ~~was~~ was served upon the mortgagor according to law.

4. When service of the rule was acknowledged by a general agent of the mortgagor, who now testifies that he was not specially authorized to acknowledge service of the rule, and it appears in evidence that the plaintiff in ejectment held the mortgaged premises under the mortgagor, by deed younger than the mortgage, and that he was in Court when the rule absolute of foreclosure was taken and made no objection to the judgment of foreclosure, it is not void as to him, and he will not be permitted to attack it collaterally for want of service in an action of ejectment against the purchaser at sheriff's sale, of the mortgaged premises.

Judgment reversed.

NATHAN EMANUEL, plaintiff in error, vs. SMITH & RICHMOND, defendants in error.

1. When a case of garnishment is called in its order on the docket, at the second term of the Court, after the service of the summons of garnishment, and after final judgment against the defendant, and the garnishee has failed to answer, and the Court allows judgment to be entered against the garnishee, this Court will not control the discretion of the Court below, (unless in extraordinary cases,) in refusing to set aside such judgment after it is signed, to allow the garnishee to answer.
2. It is the duty of the Court, if the final judgment has not been rendered against the defendant at common law or in attachment, to continue the case against the garnishee till after the rendition of such judgments.

Garnishment. *Certiorari*. Decided by Judge CLARK. Sumter Superior Court. April Term, 1869.

Emanuel vs. Smith & Richmond.

th & Richmond sued one Hay in the County-Court, garnisheed Emanuel. Emanuel did not answer the garnishment at the first term, nor at the second term, until they obtained a judgment against Hay, and until the garnish-
having been called, they had leave of the Court to enter judgment also against the garnishee, and their attorney had a judgment against him, and handed it to the Clerk to be entered on the minutes of the Court. On the same day, before the Clerk had entered the judgment on the minutes, while a jury was empanelled, Emanuel appeared, and his counsel, moved to set aside the judgment against him. At the same time, he filed his answer, denying that he had anything belonging to Hay, or owed him anything. He put his claim upon the ground that Emanuel could file his answer any time during that term, and that Emanuel was not called before judgment was entered against him.

The County-Judge overruled the motion, and a *certiorari* was issued out to reverse his judgment. After this, Hay appealed from the judgment against him. This appeal and the *certiorari* both pending in the Superior Court, and the County-Court having been abolished, and its business having been transferred over to the Superior Court, Emanuel's counsel invoked the writ of said appeal, and moved to set aside the judgment against Hay. The Judge would not set it aside, and his decision is assigned as error.

WILKINS & BURKE, N. A. SMITH, for plaintiff in error.

WILKINS & CARTER, S. H. HAWKINS, for defendant in error,
the judgment could not be set aside; Code, secs. 3491, 3492, *Millet vs. Price*, 32 Ga. R., *Harris vs. Breed*, 38 Ga. R., 1868; Constitution, Art. XI, sec. 5; that the appeal does not make it void; Code, secs. 3511, 3530, 3572, 3491, 3492, *Drake on Attachment*, 658, E.

BROWN, C. J.

1. It is the duty of the garnishee to appear at the second term of the Court, and file his answer. This should be done before the case is reached in its order on the docket. If the garnishee appears when the case is called in its order, the Court may allow him time to file his answer before it is heard. But, if he fails to appear and answer, and the case is disposed of in its order on the docket, and the presiding Judge refuses to set aside the judgment rendered against the garnishee, this Court will not, (unless in extraordinary cases,) control the discretion of the Court below. See *Harris v. Breed & Co.*, 38 Ga. R., 297.

2. But we think this judgment should have been set aside on the ground that no final judgment had been rendered against Hay, the defendant in the action at common law. Section 3491 of the Revised Code declares that the plaintiff shall not have judgment against the garnishee, unless he has obtained judgment against the defendant. We think this means *final* judgment against the defendant. And this view is strengthened by reference to the latter part of section 3228 of the Code, which says: The Court may continue the case (against the garnishee) until *final* judgment is rendered against the defendant in attachment. In this case judgment had been rendered against the defendant in the common law action, out of which the garnishment sprung; but an appeal had been entered, and the case was still pending in the Court below.

Under these circumstances, we are of the opinion that the judgment against the garnishee should have been vacated till final judgment against Hay.

Judgment reversed.

Wyley vs. Whitely *et al.*

NICHOLAS WYLEY, plaintiff in error, vs. NANCY WHITELEY
et al., defendants in error.

(McCAR, J., having been of counsel in this cause, did not preside.)

When A commenced his proceeding against B., under section 4000 of the Code, as an intruder, and B filed a counter affidavit, which was accepted by the sheriff, and returned to the Superior Court, and an issue was made up, and A afterwards sold the land in dispute to C, who filed a bill against B, which B answered, and set up equities which entitled B to a hearing, and C then moved to dismiss his bill, which was refused by the Court, which judgment was not excepted to: *held*, that equity having obtained jurisdiction and control of the case, will hold it for adjudication.

After a Court of Equity has taken the control of the case, the Court of Common Law will not entertain a rule against the sheriff to compel him to place A, or his vendee, C, in possession of the premises in dispute on account of a defect in the original counter-affidavit filed by B.

Intruders. Equity practice. Decided by Judge CLARK.
Enter Superior Court. October Term, 1869.

In December, 1865, Wyley filed his affidavit, under section 4000 of the Code, to eject Mrs. Whitely from land owned as the "Whitely dower," and on the 4th of January, 1866, she filed a counter-affidavit that she did hold in good faith and in her own right the possession of, and claim said lands as her's. The sheriff did not eject her, but returned said papers to Court.

In 1868 one Alston filed a bill in said Court, averring that in 1867 Wyley sold said land to him, and gave him a deed for title; that one Bird, as Wyley's agent, gave him possession of said land; that in 1859 Nancy Whitely conveyed said land by deed to one Ford, and in October, 1859, Ford sold it to Wyley; that Wyley had filed his said affidavit, and she had filed her said counter-affidavit, which was defective, in that she did not swear that she, *bona fide*, claimed legal right to the possession, etc., and yet she would not permit him to haul timber off said lot. He prayed that she should be enjoined from interfering with his possession of the premises. She answered the bill, averring that she had

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been induced by fraud to sign said deed, (giving a history of the transaction,) that it was really her property, and that, at least, she was entitled to it, as dower out of the estate of her husband, and prayed that said deed should be set aside.

At October Term, 1868, a rule *nisi* was sued out against the sheriff, calling on him to show cause why he should not be punished for contempt in failing to put Wyley in possession of said land under said affidavit, because the counter-affidavit was insufficient to stop him. During the term, Alston's solicitor paid up the costs of said bill, and was dismissing the same. But before the order of dismissal was entered upon the minutes, Mrs. Whitely's solicitors objected to it upon the ground that if the equities set up by her in her answer were true, the dismissal would prejudice her rights, and the Court refused to allow the bill dismissed. When the rule against the sheriff came on to be heard, the movants read the affidavits, and insisted upon a rule absolute against the sheriff, and for an order for immediate possession of said premises. Mrs. Whitely's attorneys produced said bill and answer, and said that she could not be ejected as an intruder from said premises.

The Court refused to make the rule absolute or to grant the order for possession, upon the ground that the same matters were pending in equity, in said bill, and because of the equity set up by said answer. Wyley's attorney assign said refusal as erroneous, saying that the Court erred in holding there was any equity in said answer, in considering said bill and answer at all, especially after its attempted dismissal, and in giving them such effect as to stop said original process under the affidavit.

GEORGE W. WARWICK, VASON & DAVIS, for plaintiff in error, cited as to duty of sheriff, Code, section 4000; *Cardin vs. Standley*, 20 Ga. R.; *Hass vs. Gardner*, 36 Ga. R., 477; *Perry vs. Martin*, 26 Ga. R., 436.

W. A. HAWKINS & S. H. HAWKINS, for defendant in error.

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1. After Wyley had commenced proceedings against Mrs. Whitely, as an intruder, under section 4000 of the Revised Code, he sold the premises in dispute to Alston, who filed a bill against Mrs. Whitely, *et al.*, on the equity side of Court. She answered the bill, and set up equities in her favor. Alston then moved to dismiss his bill. Her counsel objected on the ground that she had a right to a lien on the equities set up by her answer. The Court sustained the objection and refused to dismiss the bill, which Alston was not excepted to by Alston. The case was, therefore, still pending in equity, and that Court having obtained jurisdiction and control of it, has a right to hold it for adjudication.

While the case was still pending in equity between Wyley's vendee and Mrs. Whitely, Wyley came into Court and moved a rule against the sheriff, to compel the sheriff to possess Mrs. Whitely, and put him in possession, on account of a defect in Mrs. Whitely's affidavit, filed in the proceeding instituted by him against her, as an intruder.

Court refused to make the rule absolute, and this ruling was excepted to. We think the Court did right. The case was still pending in equity. That Court having obtained control, will administer equity to all the parties, and it would be improper for the Court of common law to interfere, and by order change the possession of the premises, from one party to the other, on account of a technical defect in the final proceedings at law, before the decision of the Court in equity has settled the rights of the parties.

Judgment affirmed.

The State, etc., vs. The Georgia Medical Society.

THE STATE *ex rel* of JAMES J. WARING, plaintiff in error
THE GEORGIA MEDICAL SOCIETY, defendant in error

1. Where a voluntary society applies for a charter and is incorporated to promote its objects, the acceptance of the charter subjects it to the supervision of the proper legal authorities having jurisdiction in such cases.
2. The Georgia Medical Society is a private civil corporation, and its incorporators have a property in the franchise, of which they cannot be deprived without due process of law.
3. The ninth by-law of this corporation is a legal and proper one, and is for the accomplishment of the objects of the society; but the society has not an uncontrollable discretion in its construction and enforcement. When a proper construction is made the Courts are to construe it, and judge of the legality of the action of the society under it.
4. The Superior Court of Chatham county, where this corporation is located, has the visitatorial power over it, with authority to redress wrongs which the corporation may inflict upon its members.
5. Where a corporator has a clear legal right, which has been denied him by the corporation, and he has no other adequate legal remedy, he is entitled to relief by *mandamus*.
6. The record in this case shows that the society censured Dr. Waring for doing that which the law not only authorizes but encourages. His return to the *mandamus nisi* shows no sufficient cause for his expulsion. He is, therefore, entitled to a peremptory *mandamus* commanding and compelling the society to restore him to all his rights and privileges as a corporator.

Mandamus. Decided by Judge SCHLEY. Chatham Superior Court. January Term, 1869.

James J. Waring filed in the Superior Court of Chatham county his petition for a writ of *mandamus*, with exhibits and affidavits, averring the following facts: *
* * By an Act of the General Assembly of the State of Georgia, assented to December 12th, 1804, "The Georgia Medical Society" was duly incorporated for the purposes and powers in said act mentioned, and with the powers and privileges therein specified. The principal place of business of the said corporation is in the said county. On the twenty-ninth of August, 1868, being a regular graduate of medicine and a practicing physician in the said county, and a member and corporator of the said "The Georgia Medical Society,

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entitled by law to all the rights, privileges and franchises of a corporator of said corporation, he was served with charges and specifications. At a regular meeting of the said corporation, on the second day of September, 1868, the committee, whose names were signed to said charges and specifications, made a report of their action; at said meeting Waring excepted to said charges and specifications, as being contrary to law, and it was determined by the said corporation that the committee give the names of parties referred to in said charges and specifications.

At a subsequent meeting of the said corporation, on the 11th day of September, 1868, Waring was tried for the matters contained in said charges and specifications; he again excepted to the right of the corporation to try him as aforesaid, and the corporation found him guilty as follows:

Specification 1st, charge 1st, guilty; specification 2d, charge 1st, guilty; charge 1st, guilty; specification 1st, charge 2d, guilty; specification 2d, charge 2d, guilty; charge 2d, guilty. And not guilty as follows: Specification 3d, charge 2d, not guilty.

A vote for his expulsion from said corporation having then been defeated, it was moved and carried that he be notified by a committee appointed for that purpose, that, after due deliberation, he had been found guilty of the charges and specifications as above stated; he considers this deliberation of the society as the gravest censure; notwithstanding this decision of the said corporation, it was further moved and carried, that he be brought before the society, informed of the decision, and censured by the president. To this last measure he objected, and left the room in which the meeting was being held, but returning in a few moments, stated that after considering the matter he would receive the censure.

At the next regular meeting of said corporation, on the seventh day of October, 1868, it was resolved that the presence of Waring being detrimental to the interest of the society he be requested to tender his resignation on or before the next regular meeting of the same, which proposition he declined; at the meeting thereafter of the said corporation, on

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the 14th day of October, 1868, the following preamble and resolutions were offered and passed, viz :

"Whereas, at a meeting of the Georgia Medical Society, held on October, 7th, 1868, at the residence of Dr. J. B. Read, a resolution was passed by over two-thirds of the members present, to-wit: that the presence of Dr. J. J. Waring being detrimental to the interest of this society, he is hereby requested to tender his resignation on or before the next regular meeting of the same: And whereas, the said Dr. J. J. Waring has declined to comply with the request: And whereas, at the meeting of the Georgia Medical Society, held at the residence of Dr. R. P. Myers, on the 2d September, 1868, and again at the meeting of the Georgia Medical Society, held at the residence of Dr. Wm. Duncan, 30th September, 1868, he, the said Dr. J. J. Waring did behave discourteously to the society, and in such a manner as would render him ineligible to membership, and has rendered himself obnoxious to two-thirds of the members of the society; therefore, be it

Resolved, That at a meeting of the Georgia Medical Society, to be held 18th November, 1868, the Georgia Medical Society will, for the foregoing reasons, vote upon expelling Dr. J. J. Waring from the society: Provided, however, that Dr. J. J. Waring shall be permitted to resign at any time before that day.

Resolved, That the Secretary be ordered to hand Dr. J. J. Waring a copy of these preambles and resolutions on or before Saturday, the 17th inst."

Said preamble and resolutions; certified by the Secretary, were handed to Waring, and in reply thereto he addressed a communication to the President and members of the Georgia Medical Society, stating, among other things, that he could not resign his membership, and do voluntarily that which he had struggled through every species of mortification to prevent, because membership of the said corporation, according to the Constitution and By-laws aforesaid, was necessary to his regular standing as a physician in the city of Savannah

and elsewhere, and to the full and complete enjoyment of the benefits and rights in the pecuniary emoluments arising from the practice of his said profession, and disclaimed all intentional discourtesy to the society or its members, and protested against the irregularity and illegality of the course resolved upon as set forth in the said preamble and resolutions. Said communication was read at the meeting of the corporation held October 28th, 1868, was received, placed upon file among the records, and Waring was notified of the action taken. At the meeting of said corporation, on the said 18th day of November, 1868, Waring, by a written communication, informed the corporation that he was absent in consequence of severe indisposition, disclaimed any intentional discourtesy to the society, and protested against any proceedings upon the resolutions as aforesaid, as unlawful and unjust, which communication was spread upon the minutes; then a vote was taken and carried, that the preamble, charges and resolutions of October 14th, 1868, be confirmed; and then a vote was taken and carried upon expelling Waring from membership of said society, and he was expelled and deprived of his right, privilege and franchise of a corporator as aforesaid, by a vote of the members of said corporation.

He became a member and a corporator of said corporation in the year 1863, and paid the initiation fee established by the said by-laws, and has paid the annual taxes and various assessments required of him from time to time; the privilege and franchise of membership is of great pecuniary value to him, as it entitles him to the use of the library, composed of medical and scientific standard works and periodicals, and the surgical and anatomical specimens, the property of said corporation, and is necessary to his regular standing as a practitioner of medicine, and to the full and complete enjoyment of the benefits and rights in the pecuniary emoluments arising from the practice of his said profession; and said action of "The Georgia Medical Society" in expelling him as aforesaid from membership, and depriving him of his right and franchise as a corporator in said corporation is unconstitutional and contrary to law.

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He has distinctly and expressly demanded that "The Georgia Medical Society" should admit, restore and reinstate him to the privilege of membership, and to his right and franchise of a corporator in said corporation, from which he was illegally expelled as aforesaid, and "The Georgia Medical Society" has refused to do so; he is legally entitled to be admitted, restored and reinstated as aforesaid, and has no other specific legal remedy for the legal rights aforesaid except the writ of *mandamus* to compel "The Georgia Medical Society" to perform its official duty, and to restore and reinstate him to the privilege, right and franchise of a member and corporator of said corporation.

Therefore, he prayed that the State's writ of *mandamus* be issued, directed to "The Georgia Medical Society," commanding it to admit, restore and reinstate him in and to his privilege, right and franchise of a member and corporator of said corporation; or in default or refusal to do so, to show for cause, some good and sufficient excuse to the contrary thereof, and why the said duty has not been performed and discharged.

The Act of Incorporation alluded to is in these words:

"An Act to incorporate the Georgia Medical Society."

WHEREAS, Noble Wimberly Jones, President; John Irvine, Vice-President; John Grimes, Secretary; Lemuel Kollock, Treasurer; John Cumming, James Ewing, Moses Sheftall, Joshua E. White, William Parker, Thomas Schley, George Jones, George Vinson Proctor, Henry Bourquin, Thomas Young, Jun., Peter Ward, William Cocke, James Glenn, and Nicholas S. Bayard, have by their petition represented, that they have associated in the city of Savannah, under the style and name of "The Georgia Medical Society," for the purpose of lessening the fatality induced by the climate and incidental causes, and improving the science of medicine, and in order to insure and establish their said institution in a permanent and effectual manner, so that the benevolent and desirable objects thereof may be executed with success and

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advantage, have prayed the Legislature to grant them an act of incorporation.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and by the authority of the same, it is hereby enacted,* That the several persons hereinbefore named, and others who are, or may become members of the said society respectively, the officers and members thereof, and their successors, shall be, and are hereby declared to be a body corporate in name and deed, by the style and denomination of "The Georgia Medical Society," and by the said name and style, shall have perpetual succession of officers and members, and a common seal to use; and shall have power and authority to make, alter, amend and change such by-laws as may be agreed on by members of the same: *Provided*, such by-laws be not repugnant to the laws or the constitution of this State, or the United States.

SEC. 2. *And be it further enacted,* That they shall have full power and authority, under the style and name of the Georgia Medical Society, to sue for, in the name of their President and Vice President, for the time being, and recover all such sum or sums of money, as are, or hereafter may become due the said society, by any name and style whatever, in any court of law, or at any tribunal having jurisdiction thereof; and the rights and privileges of the said society in any court, or at any tribunal whatever, to defend, and also to receive, take and apply such bequests or donations as may be made, to and for the uses and purposes intended by the said society, and shall be, and are hereby declared to be vested with all the powers and advantages, privileges and immunities of an association or society of people incorporated for the purposes and intentions of their said association.

SEC. 3. *And be it further enacted,* That this act shall be, and is hereby declared to be deemed and considered a public act, to all intents and purposes whatever.

Assented to December 12, 1864.

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So much of the Constitution as throws light on this controversy is as follows :

“ARTICLE II. This society is established in the city of Savannah for the advancement of medical science and the cultivation of professional and social intercourse and good feeling among its members.

“ARTICLE III. The resident members of this society shall be composed of regular graduates of medicine, and shall be gentlemen of respectable social position.

“ARTICLE VIII. With a view to the collection of an extensive library, composed of medical and scientific standard works and periodicals, the members of this society will exert themselves to obtain contributions of books on medicine and its correlative sciences.

“ARTICLE IX. With a view to preserve for the use of the profession large numbers of surgical and anatomical specimens, the members of this society will exert themselves to obtain contributions of such specimens for the establishment of an extensive museum.”

The By-laws touching this question were as follows:

“ARTICLE VII. No member of this society shall consult with or recognize as a regular practitioner of medicine, any physician who shall have become a resident practitioner for two months and shall have failed to become a member of the society.

ARTICLE IX. Any member who shall be guilty of ungentlemanly conduct during the session of the society, or who shall conduct himself, out of the society, in such a manner as would render him ineligible to membership, shall be expelled from the society according to the wishes of two-thirds of the members of the society present, provided that in every instance specific charges be set forth and handed to the individual at least one month before the society takes action thereon.”

charges and specifications presented against Dr. Waring as follows :

Charge 1. That Dr. James J. Waring has forfeited his name as a gentleman of respectable social standing. (Art. 10 Constitution Georgia Medical Society.)

Specification 1. In that the said Dr. James J. Waring, on or about the 19th August, 1868, did become the surety on the bonds of one Richard W. White, a person of color, now under indictment before the grand jury for larceny, elected Clerk of the Superior Court of Chatham county, in opposition to the wishes of the entire respectable community, thereby facilitating the qualification for office of said disreputable person and causing the removal of a responsible and respectable citizen.

Specification 2. In that the said Dr. James J. Waring, on or about the 8th, 10th, 12th and 14th days of August, 1868, voluntarily became surety on the bonds of Henry Broom, Josiah Grant, David DeLyon, and William Mitchell, persons of color, charged with inciting a riot, and threatening the life of an old and unoffending citizen, thus upholding and abetting whose seditious characters endanger the peace of the community.

Charge 2. That, the said Dr. James J. Waring has conducted himself in such manner as would render him ineligible to membership. (Art. IX, By-Laws Georgia Medical Society.)

Specification 1. In that the said Dr. James J. Waring, on or about the 19th August, 1868, affiliating with depraved and disreputable persons, became surety on the official bond of Richard W. White, a person of color, elected by negroes in opposition to the votes and wishes of the entire respectable community, thereby facilitating his induction into office and causing the removal of the old incumbent, a highly respectable citizen.

Specification 2. In that the said Dr. James J. Waring, on or about the 8th, 10th, 12th and 14th August, 1868, did become surety for Josiah Grant, David DeLyon, Henry

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Broom and William Mitchell, persons of color, charged with riotous conduct, and with threatening the life of a citizen without provocation, and thus keeping at large in the community persons seditious and pestilent, who endanger the peace of the community.

Specification 3. In that the said Dr. James J. Waring did furnish a Dispensary prescription to a person, and subsequently (or at that time) charged the patient for the medicine which was allowed gratis by the city.

Specification 4. In that the said Dr. James J. Waring did hold a medical consultation with a physician in the city, and whom he knew not to be a member of the Georgia Medical Society, and in violation of the rule thereof."

Mandamus nisi issued, and to it "The Georgia Medical Society" made the following answer:

The said Georgia Medical Society, although incorporated by the Act of the General Assembly of the State of Georgia is, by its constitution, only incorporated for private purposes that is to say, for the advancement of medical science and the cultivation of personal and social intercourse and good feeling among its members; and that, such being alone the objects of the said Georgia Medical Society, this honorable Court hath no jurisdiction to interfere with or control the action of said society with reference to the expulsion of the said James J. Waring therefrom; and this respondent demurs and excepts to the jurisdiction of the Court upon the matter and causes in the petition of the said James J. Waring set forth, and prays that the said rule *nisi* may be discharged.

And this respondent insisting on the want of jurisdiction in the Court to control the action of the Georgia Medical Society in the premises in the petition of the relator set forth and not waiving the same for further cause to said rule shews that by the ninth by-law of said Georgia Medical Society, which by-laws were of force, and assented to by the said James J. Waring at the time he became a member of said society, any member of said society who should be guilty

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of ungentlemanly conduct during the session of the society, should be expelled from the society, according to the wishes of two-thirds of the members of the society present: provided that in every instance specific charges be set forth, and handed to the individual member at least one month before the society take action thereon; and that the said James J. Waring was guilty of ungentlemanly conduct during the session of the society, on the second day of September, eighteen hundred and sixty-eight, and again on the thirtieth day of September, in the year eighteen hundred and sixty-eight, and that notice of such specific charges for such conduct were set forth, and handed to the said James J. Waring, and he was duly notified that such charges would be acted upon on the eighteenth day of November, in the year eighteen hundred and sixty-eight, said notice having been served upon the said James J. Waring one month prior to said eighteenth day of November, in the year eighteen hundred and sixty-eight, and the said James J. Waring having shewn no reason satisfactory to the society for his conduct aforesaid, he was, on said eighteenth day of November, in the said year eighteen hundred and sixty eight, duly and lawfully, in accordance with the constitution and by-laws of said society, found guilty and expelled therefrom; and to these matters of fact this respondent prays that they may be enquired of by the country.

And further, this respondent not waiving the want of jurisdiction of this honorable Court, but insisting as aforesaid, saith that the said James J. Waring, by reason of such expulsion from said society, is not in any way prevented from practising his profession as physician, and collecting his fees and charges therefor, and this fact the respondent prays may be enquired of by the country.

And for further answer to the said rule, this respondent, not waiving the want of jurisdiction of the Court, saith that he hath no surgical and anatomical specimens, and that the library is composed of some fifteen or twenty volumes, and some plates, of not more than \$125 00 in value, said books being such as are ordinarily in the private library of the

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medical practitioner. And these facts the respondent *prays* may be inquired of by the country.

And upon the coming in of said answer, Waring, by his counsel, moved the Court to quash or overrule said answers as insufficient, and to grant him a peremptory *mandamus*; upon which motion, after argument had, the Court overruled the motion, deciding as is stated in the assignment of errors.

Waring's attorneys sued out their bill of exceptions averring that the Court erred:

1. In deciding that Waring had no vested rights as a member and corporator of the "Georgia Medical Society."

2. In deciding that Waring had no property in the "Georgia Medical Society," because he had no rights which he could buy or sell, or bequeath, or transmit.

3. In deciding that Waring had not such a property in the "Georgia Medical Society" as was protected by the clause of the Constitution of the United States and State of Georgia, declaring that "no person shall be deprived of his property without due process of law."

4. In deciding that the said society has no right to acquire property otherwise than by bequest or donation.

5. In deciding that the right of said society to acquire property was not "property" in the relator, inasmuch as the property acquired must be obtained and held for the purposes of the incorporation, as set forth in the "Act of Incorporation."

6. In deciding that the franchise of membership in said corporation is not "property."

7. In deciding that if relator had a vested right of property in said corporation it was ascertainable, and could be recovered by an action at law.

8. In deciding that *mandamus* was not the proper remedy to enforce relator's rights, or to restore him to membership in said corporation.

9. In refusing the application for a peremptory *mandamus*.

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HARTRIDGE & CHISHOLM, for plaintiff in error, made the following points: See Act of Incorporation for the legal character of the defendant. It is a *private civil corporation*: see Act of Incorporation. The College of Physicians in London, incorporated for the purpose of improving the science of medicine, held to be a *private civil corporation*: 1 Blackstone's Com., Marg. p. 471. This Medical Society, though a private corporation, has for its objects matters of public interest—for the public have an interest in the improvement of the science of medicine and the lessening of the fatality induced by climate and incidental causes: 4 Burr., 2186–7–8; Dr. Askew's case. The Legislature declares the Act of Incorporation to be a public act, thus declaring their opinion that the public were interested: See Public and Private Acts, 1 Blackstone's Com. This, then, being a *private civil corporation*, it is subject to no visitorial power save that of the Superior Court of this county, which is the same as the King's Bench in England, "where, and there only, all misbehaviours of this kind of corporations are inquired into and redressed and all their controversies decided:" 1 Blackstone's Com., Marg. p. 481; 2 John. Chan. R., 335, etc. (Kent's decisions)." But, if this be a private *alms* corporation, the original founders, becoming themselves the corporators, and having no one to visit, cannot be both *visitors* and *visited*, but are subject to the laws of the land administered by the courts: Dartmouth College, 1 Wheat., 674–5; Plainfield Academy, 6 Conn., 544–5. Each individual member of a corporation is said to have a franchise or freedom: 2 Blackstone's Com., Marg. p. 37. A franchise is property; it is an incorporated hereditament: 2 Blackstone's Com., Marg. p. 21. The privilege of membership or franchise in a corporation is property, and valuable though it have no market value: 4 Wheat., 699. 657.

If the relator has been deprived of this franchise, his property, he has a clear legal right to be restored, unless he has been legally expelled. And this can only be attained by compelling the Georgia Medical Society, in its *corporate* and

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official capacity, to restore to him the rights, privilege, and franchise of a corporator. To accomplish this, *mandamus* is the remedy: 20 Pick, 495; 2 Burr, 1045; 3 Burr, 1265; 4 Bacon Abg., p. 500; Con. of Geo., p. 13; Code, 3142; 1st Cranch, 168—U. S. Supreme Court. All corporate duties are *official duties* in the meaning of the Code, for in another section it declares that every corporation acts through its officers: Irwin's Code, sec. 1679; Ang. & Ames, sec. 696-7, 8th ed.

Section 3143 of the Code, which says that *mandamus* does not lie as a private remedy between individuals, does not mean that it will not lie between an individual and a corporation. Section 5 of the Code, which says the word *person*, when used, shall mean corporation, does not say when the word *individuals* is used it shall mean corporations; and the use of the term *individuals* instead of *person*, proves that the legislature drew the distinction. Besides, such a reading would make it applicable equally to *public* and *private* corporations.

The writ is not limited to public corporations. See Angel & Ames on Private Corporations, chapter on *mandamus*, and all the cases cited by relator.

Nor is it limited to the enforcement of *public rights*. For it lies to be restored a member of a church; Green vs. African Methodist Church: 1st Serg't & Rawle, 254. It lies to restore members of private corporations for charitable purposes: Com. vs. St. Patrick's Society, 2 Binney, 448; Com. vs. Penn. Ben. Ins., 2 Serg't & Rawle. It lies to restore a corporator of a private academic corporation, though no emoluments were attached: Fuller vs. Plainfield School, 6 Conn., 532. It lies to restore a doctor to the college of physicians to the *franchise* of membership, though not to the corporate offices, Dr. Goodard's case: 4 Bacon's Abr., 507. It lies to admit one who has been found eligible to the college of physicians, which Blackstone has said, as above, to be a private civil corporation; and in this case Lord Mansfield said the respondent was a *corporation*, and, therefore, the Court had *jurisdiction*, Dr. Askew's case: 4 Burr, 2186-7-8. It

lies to compel a private corporation, the Savannah and Ogeechee Canal Company, to execute a contract and build a bridge over a private road for private use: 26 *Ga.*, 665. And in case of a bank, a private corporation: 12 *Ga.*, 178. The performance of a corporate *function* is a *duty* not to be demanded by action, but compelled by *mandamus*: 2 Sel. N., P. 1083—note, late edition; 5 Watts, 152; 4 *Ga.*, 44. It lies when there is a right and no other specific and adequate legal remedy: 3 Burr, 1267; 4 *Ga.*, 117; 12 *Ga.*, 178; 26 *Ga.*, 665. The remedy to prevent *mandamus* must be at law: Ang. & Ames, 711; 3 Term, 651; 10 Wend., 293; 1 Cow., 423; 12 John., N. Y., 414. The remedy to deprive one of the writ of *mandamus* must be adequate and specific: Ang. & Ames on Cor., sec. 712; 26 *Ga.*, 676.

Ungentlemanly conduct is not sufficient excuse for not restoring him or proper for expelling him. The difference between *amotion* which relates to the removal of *corporate officers* and *disfranchisement*, which is the taking away of the *franchise*, the property of the corporator: 2 Kent, 298; Wilcock on Mun. Cor., 150; Grant on Cor. In a corporation of this kind, and particularly where there is joint property, a corporator can not be disfranchised unless the authority is expressly given in the charter: 2 Kent, 298; Dartmouth College, 4 Wheat., 675-6; Bowdoin College, 1 Sumner, 301; Plainfield Academy, 6 Conn., 545-6; 2 Raymond, 1566; Ang. & Ames on Cor., chap. 12, secs. 408 and 409, 8th ed.

The *incidental* or *implied* power of *amotion* has been determined to exist for three causes: 1st. Where the officer has been guilty of some offence which is infamous and has been convicted by a jury. 2d. Where he has been guilty of some offence against his oath of office and duty as a corporator. 3d. Where he has been guilty of an offence of a mixed nature, that is infamous and against his duty as a corporator, such as *bribery*: 2 Esp. N. P., 317-19; 1 Burr, 538; 2 Binney, 448. The cause returned, "ungentlemanly conduct," does not come within either of the above. Reliance is placed upon a by-law, which the society has no authority to make, to sustain the return. 1st. Because there is no such power

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to make such a by-law expressly conferred in the charter; see cases above cited. 2d. Because, when the authority is incidental or implied, it must rest in the *whole body*, and this by-law gives the power to two-thirds present, when a majority of the whole must do it: 8th Term, 352; 10 Mood, 76; Cowper, 503. 3d. The by-law creates a forfeiture, and is void: 1 Bishop Crim. L., sec. 58. 4th. The by-law is highly penal, and must be tested by the law relating to such statutes: 1 Bishop Crim. L., sec. 55. It does not define ungentlemanly conduct, and therefore does not prescribe a rule of conduct: 1 Black's Com., Marg. p. 44-60. It is void for ambiguity: 1 Bishop Crim. L., sec. 55.

The society may construe anything to be ungentlemanly conduct: Eden on Penal Laws, 309. Whenever the society interprets this by-law, and makes that punishable which the law previously permitted, they make the by-law *ex post facto*: Eden on Penal Laws, 309. The manner of construing this by-law enables the society to legislate upon the *social status* of the *citizen*, and to punish for *opinions*, which is unconstitutional: See Constitution of Georgia, secs. 9, 10. This by-law takes away the property of relator without due process of law, and is void; Cons. of Ga., p. 1, sec. 111. If the by-law is, then, illegal, all action under it is illegal, and the *mandamus* should be made at once peremptory: 2 Binney, 448; 1st Black.'s Comm., 476, Marg. p. But if the by-law should be held legal, the return under it is still insufficient. 1st. Because it does not state that every individual member was summoned for that purpose; 2 Burr, 723; 1 Stra., 1051; 2 Burr, 738; Tappan on Mand., Marg. p. 201. 2d The return should set forth all necessary facts precisely, to show that the person was removed in a legal and proper manner and for legal cause; it is not sufficient to set out *conclusion only*: 2 Burr, 731; 2 Esp. N. P., 682; 1 Serg't & Rawle, 255.

A return in too general terms is bad, as to say that the party had absolutely refused to obey rules and orders without saying what these rules and orders were: 2 Lord Raymond, 1564; 2 Esp. N. P., 683. A return for neglect of duty has been held to be bad, without stating the particular instances

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neglect, that the Court may judge: 1 Stra., 58; 2 Esp. N. P., 683; Tappan on Mand., Marg. p. 199. A return which does not contain the specific charges and specifications is bad: Angel & Ames on Cor., top page 597, 2d edition; 6 Serg't & Rawle, 476. If this return is not good, it should be quashed, and the peremptory *mandamus* awarded: Tappan on Mand., 358-9, Marg. p.; 2 Burr, 723; 2 Term, 181; East., 188; 8 Term, 353; 1st Serg't & Rawle, 255; 2 Serg't & Rawle, 141; 2 Binney, 449-450; 6 Conn., 543. Strictness not dispensed with in a return by the Statute of Mass.: Tappan on Mand., top page 394. If the return is sufficient there is nothing to submit to a jury.

But if this return is to be considered with the petition, then we are to look to it for an explanation of the words and specific charges, there is still no dispute about facts, for the petition then constitutes the return. No matter what they may be called, whether ungentlemanly conduct or any other name, it is the substance, the *specifications*, not the charge, which makes the offence: *O'Halloran vs. State of Georgia, Ga.*, 206. Nor do they come under any one of the heads we have mentioned, for which a corporation can exercise the incidental power of *amotion* even. The act is done *malum in se* in cases giving incidental power of *amotion*: 2 Esp. N. P., 318. To make a crime or an offence there must be a combination of act and intent: Code of Ga., sec. 4227. The offence must be infamous, such as forgery, and a conviction for an assault is not enough to *remove*: 2 Esp. N. P., Marg. p. 677. The offence, if not infamous, must have no respect to the corporation that is detrimental to its rights, privileges, or franchises: 2 Esp. N. P., Marg. p. 677, No. 3. Personal offence from one member to another, or a mere *contempt* of, or contemptuous words used to, the corporation or any member, not sufficient ground of *amotion*: 2 Esp. N. P., Marg. p. 677, No. 3; Dr. Bentley's case, *Strange*, 557. It is not sufficient to disfranchise: 2 Binney, 448; 6 Conn., 544.

The 9th by-law itself requires that *specific charges* and *specifications* be handed to the accused one month before

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action. The record shows that the relator was found guilty the night the resolutions were introduced, when he was present. His notice was that he would be expelled unless he resigned. This was clearly *illegal*, not simply irregular. *Term*, 352; *T. U. P. Charlton*, 235. The whole record shows that the action on the last charges or *resolution* was but a reconsideration of the sentence passed upon him after the trial upon the first charges, and, therefore, is void. The case is similar to the *Commonwealth v. Guardians of the Poor*: 6 Serg't & Rawle, 469. The *averse* of respondents must be confined to facts; it cannot be legal consequences: 2 Burr, 731, bottom of the page; *Span on Mand.*, top page 393. *Traverse of immaterial matter is bad*: *Tappan on Mand.*, top p. 392. All material allegations and allegations of the writ, which are not denied or traversed by the return, are in contemplation of law admitted by respondents: *Tappan on Mand.*, top p. 392.

THOMAS E. LOYD replied:

This is strictly a private corporation. There is no like emolument or pecuniary interest to any of its members contemplated. It is entirely a voluntary society, and no one has a right to membership except he be duly elected by the ballots of two-thirds of the members. The charter of incorporation from the State does not create this association; it existed before the charter. The charter gave it some privileges, but did not change the character of the association. *Wheaton*, p. 638. Such being the character of this corporation, the courts will not interfere by *mandamus*, but leave its affairs under the control of its members: *Tappan on Mandamus* m. p. 137, 138, m. p. 216, 217; *Carthew*, p. 1 *Modern*, m. p. 83; 2 Shower, 178, 191; 2 Barn & Ald, 622; 5 Barn & Ald, 899. What right did the relator acquire by becoming a member of the corporation? He did not obtain a license to practice as a physician, for that was given him by the laws of Georgia: Code, sec. 1416-17. Nor does his expulsion in any way conflict with that law. The rule with reference to consultation gives no pos-

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it is only negative in its character. The return discloses that there are no anatomical specimens, and but a few, or plates, for the deprivation of which, monetary damages may be assessed in an action at law: 7 East, 353.

The rights then, if any, of which the relator has been deprived, are mere private rights, for which *mandamus* will not lie by the Code of Georgia: Code, secs 3143 and 5. But, admitting that the relator had rights, he was properly expelled by the by-laws, Article IX. We say that this is a good ground, and one which the society had a right to pass: 7 T. R.,

The power of expulsion and disfranchisement is incident to a corporation of this character, where no pecuniary interests are involved: 2 Kent Com., 297, 1 Burrows, 539; see also on Real Prop., 387.

The party received full notice under the by-law, with an opportunity to defend, but contented himself with protesting against the action of the society. The offence with which he was charged, was committed in the face of the society, and he was properly expelled. But, if the validity of the by-law is doubtful, it does not lie in the mouth of the relator to deny it. He joined the society under the by-law: 5 Burrows, 2761. If this be so, it answers the counsel's argument in reference to the deprivation of property. The relator took any property or franchise *sub modo*. He could not so long as he did not violate the constitution and by-laws of the society; he consented to forfeit it if he did violate Article IX of the by-laws. Even if the proceedings had not been conducted with perfect regularity, still, if good ground for disfranchisement be shewn, the *mandamus* will not be granted: 2 Term, 177; 2 Cowper, p. 523.

JOHN, C. J.

It was insisted, in this case, that the Georgia Medical Society was in existence long before it was incorporated, and its objects were in no way changed by its application for acceptance of its present charter from the State. This is very true, but its legal responsibilities were changed by the acceptance of the charter. While it remained a vol-

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untary society, the courts had no jurisdiction over it, if it violated no law of the State, and its members had no property in their membership which the law could protect. But its acceptance of the charter subjected it to the supervision of the proper legal authorities having jurisdiction in such cases: 4 Wheat., 674-5; 6 Conn., 544-5.

2. When the voluntary society accepted the charter, it became a private, civil corporation, and the incorporators, then in being, acquired a property in the franchise, and every person who has since become a corporator has acquired a like property. The property which the corporator acquires is not visible, tangible property; but it is none the less property, because it is invisible and intangible. It is not a corporeal hereditament; but it is incorporeal. Blackstone, in his Commentaries, volume 2, page 21, says: That incorporeal hereditaments are divided into ten sorts; one of these consists of *franchises*. Bouvier, in his Law Dictionary, volume 1, page 593, says the word franchise has several meanings, one of which he gives as follows: "It is a certain privilege conferred by grant from the government and vested in individuals. Corporations or bodies politic are the most usual franchise known to our law." The law books are full of the doctrine that persons may have a property in incorporeal hereditaments, franchises, etc.

Property, says Bouvier, volume 2, page 381, is divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandize and the like; the latter consists in *legal rights* as choses in action, easements and *the like*. Blackstone says, volume 2, page 37, it is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with power to maintain perpetual succession, and to do other corporate acts, and each *individual member* of such corporation is also said to have a franchise or freedom. We think it well settled by these and other authorities, that a corporator in a private, civil corporation, has a property in the franchise, of which he can not be deprived without due process of law.

3. It was insisted by the learned counsel for the plaintiff in error, that the ninth by-law of this corporation, is unauthorized by the charter, and that the corporation is not justifiable in expelling a member for its violation, that to deprive a corporator of his property in the franchise under it, is to deprive him of his property without due process of law. We think the ninth by-law a proper one in view of the objects of the society, and we hold that the charter conferred upon the corporation the power to ordain and establish it, and that they have the power to expel a member when a proper case arises under it.

But we hold that the society has not an uncontrollable discretion in its construction and enforcement. They cannot, under pretext of enforcing this rule, take personal or private revenge, or make it the instrument of religious intolerance, or political proscription. When a member feels that he is aggrieved or injured by the illegal or oppressive action of the body, it is his right to appeal to the Courts for redress and protection; and it is the right and duty of the Court to investigate such charges, when properly before it, and to decide of the legality of the action of the society in expelling a member or depriving him of any other legal right. //

4. The rule of law on this subject is thus stated by Judge Blackstone, volume 1, page 381. The king being thus constituted by law, visitor of *all civil corporations*, the law has also appointed the place where he shall exercise this jurisdiction, which is the Court of King's Bench, where, and where only, all misbehaviors of this kind of corporations, are inquired into and redressed, and all their controversies decided. In this State the same visitorial power of correcting the misbehaviors of these corporations, and deciding their controversies, is vested in the Superior Courts of the counties where they are located, which, in England, belongs to the King's Bench. See 5 John. Ch. R., 335.

It was contended, with much zeal and ability, by the able counsel for the defendant in error, that *mandamus* is not the proper remedy, even if we admit that the rights of Dr. Waring have been infringed, or that he has been deprived of them

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by the illegal action of the society. The rule, as laid down by this Court in a number of cases, is that a person having a clear legal right under the laws of this State, is entitled to the writ of *mandamus*, if he has no other remedy to enforce it: 4 Ga., 26 and 116; 12 Ga., 170; 26 Ga., 665.

But it is insisted that the Code, section 3143, has changed this rule; and that *mandamus* does not now lie as a private remedy between individuals to enforce private rights. We do not think this section of the Code was intended to deny the writ to the corporator, who is deprived of this rights by the corporation, when he has no other adequate remedy for their enforcement. \\ A corporation having been created, invested with certain powers, and charged with certain duties to be performed for the benefit of the public, is not a private *individual*, in the sense of the word as used in said section of the Code, and a corporator whose rights are withheld or violated by the corporation, who is without other remedy, is entitled to the writ. \\

In the Commonwealth *ex rel.*, etc., vs. The Mayor of Lancaster, 5 Watts, 152, Gibson, C. J., says: "An action to enforce the right could not be maintained against the corporation because performance of a *corporate function* is not a duty to be demanded by action; and unless recourse could be had to the *functionary* in the first instance, the relator might have a cause for redress without a remedy." See 4 Ga., 44.

Here the discharge of a corporate duty is treated as an office or function, and the corporation as a functionary. In this sense, no doubt, the legislature, in the adoption of the Code, intended to treat them.

The object of this society, as cited in their charter, was "for the purpose of lessening the fatality induced by climate and incidental causes, and improving the science of medicine." The whole community have an interest in the success of this laudable undertaking; and if the functions conferred by the charter, for the benefit of the public, are not faithfully performed, and one of the corporators, who has no other adequate redress, is injured by the conduct of the corporation

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(the functionary,) the Courts will grant him relief by *mandamus*.

6. The record in this case shows no sufficient cause to justify the society in expelling Dr. Waring from his rights and privileges as a corporator. He was expelled for doing that which the law of this State not only authorizes but encourages. His offending consists in the fact that he became one of the sureties on the official bond of a colored citizen of his county, who had been elected Clerk of the Superior Court of the county, by a majority of the legal votes cast at the election for that office, and in the further fact that he became surety on the bonds of certain other colored citizens who were charged with the offence of riot, for their appearance at Court to answer the charge as the law directs. The very fact that the law requires the Clerk of the Superior Court to give bond and security for the faithful discharge of his duties, is sufficient to justify any citizen of the county in becoming one of his sureties, and to protect him in contemplation of law, from the imputation of having forfeited his position as a gentleman by so doing.

Again, it is not the object of law to punish citizens of this State, whether white or black, by imprisonment, for offences of which they have never been convicted. When they are charged with violations of the Penal Code, the requirement of the law is, that they appear at the proper time and place, and answer the charge; and to secure such appearance, they are required to give bond and security, and it is only on failure to give the bond, that they can be imprisoned. As innocent persons are often confined in prison under charges, because of their inability to give bond, the law favors bail whenever the offense is, by law, bailable. And the law favors this even in the case of the guilty, till the trial. This is not only best for the public, as it saves the tax-payers the expense of keeping them in jail, but it is just to the accused, who receive the legal punishment for their crimes, if guilty, under the sentence of the Court after legal conviction. How then does a citizen forfeit his corporate rights as a member of a civil corporation, or his position as a gentleman, by doing an

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act that is not only encouraged by the laws of his State, but is a positive public benefit?

But it is said Dr. Waring was not expelled for becoming surety on the bonds above mentioned, but for ungentlemanly conduct in the presence of the society. What ungentlemanly conduct? The ninth by-law requires that "specific charges" be set forth and handed to the accused at least one month before the society takes action thereon. What specific charges of ungentlemanly conduct in presence of the society, were ever handed to Dr. Waring? What did he say or do in presence of the society, to forfeit his position as a gentleman? The record is silent. That silence is significant. That which is material and is not averred by the society in their answer is presumed not to exist. No ungentlemanly conduct in presence of the society is set forth in their response, and this Court must presume none existed.

Dr. Waring was convicted of the charges first mentioned, in reference to the suretyship, and brought formally before the society, and censured. To this illegal and unauthorized proceeding he submitted. But, not satisfied with this, at the next meeting of the society, he was again brought up, and his resignation demanded, and he was given till the succeeding meeting to comply with the imperious and unauthorized demand. This he declined to do. And a preamble and resolutions were then passed, setting a future day when the society would vote on his expulsion for refusing to resign, and for discourteous behavior towards the society at two former meetings. In what the discourteous behavior consisted we are not informed by the record. In the meantime, however, the gracious privilege of avoiding expulsion by resignation was still held out to Dr. Waring. When the time came for the much cherished object, by the infliction of the extreme penalty of expulsion, Dr. Waring was at home, sick, and unable to attend; but he wrote the society, disclaiming all intentional discourtesy to it or its members; and protested against the irregularity and illegality of the course resolved upon, as set forth in said preamble and resolutions. But all to no effect. His expulsion was pre-determined, and

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that determination was executed. A more illegal or unjustifiable proceeding has seldom been brought before a Court.

After argument had, and a thorough examination of this case, it is the unanimous judgment of this Court, that the judgment of the Court below be reversed, and the Judge of the Superior Courts of said county is hereby instructed and ordered to grant a peremptory *mandamus*, commanding and compelling the said "The Georgia Medical Society" to restore the said Dr. James J. Waring to all his rights and privileges as a corporator in said society.

F. M. STREET, *et al.*, plaintiff in error, vs. E. C. LYNCH, defendant in error.

1. Where A purchased lands from B and took bonds for titles, and went into possession and the evidence raised a presumption that he paid part of the purchase money and A, while in possession, sold to C, and received the purchase money in full, and gave C a bond for titles and delivered to him the grants from the State to the land and agreed to deliver the possession at a future day and A afterward sold the same land to D and A and D went to B and paid off the balance of the purchase money due from A to B, and B made a deed to D and the jury found that D had notice of the purchase by C when he bought of A: *Held*, that A, by his purchase from B, had an equity, which he could sell to C, and that D, having purchased with notice, and having obtained the legal title, held it as a trustee for C, upon the payment to him by C, of the balance of the purchase which he paid to B.
2. When the Court charged the jury that the case turned mainly upon notice, and the counsel did not ask the Court to charge upon the legal effect of rumors as notice: *Held*, that it is no sufficient reason for granting a new trial that the Court did not explain what amounted to notice, as applied to the facts in evidence, when no such request was made by the counsel, who now complain of the charge.

Bill for specific performance. Tried before C. D. McCUTCHEN, an attorney, selected by the parties. Dade Superior Court. November Term, 1868.

Lynch, by bill, averred that on the 17th of June, 1863, in Rutherford county, Tennessee, he bought of Buford Bur-

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nett, of Dade county, Georgia, certain lands in Dade county, at \$5,000 00, and then and there paid him for the same, i. e., \$3,500 00 in Confederate currency and \$1,500 00 in stock; that Burnett exhibited to him a bond for titles to said land, and said that he had some of the purchase money to pay, and would pay it and get a deed and make Lynch a deed when Lynch came to Georgia in July, 1863; that because Burnett had no deed he (Lynch) took his bond for titles; that he was to get possession of part of the premises in July, 1863, and of the balance on the 1st of January, 1864. (This bond purported to have been made in Dade county, Georgia, and recited that on said day Burnett had sold Lynch said land "for the sum of \$5,000 00 in cash," and specified nothing which Lynch was to do; but its condition was: "Now, by said E. C. Lynch complying, on his part, the said Buford Burnett is to make, or cause to be made, a good and lawful title to said lands to said E. C. Lynch or his assigns.") Further, he averred that he lived in the lines of the Federal army and the land was in the lines of the Confederate army, and so he could not go to it in July, 1863, and did not do so till after the war; that when he did go, he found said Street in possession, and he refused to vacate the premises, alleging that he was the owner of the land; that Street had bought said lands from Burnett in August, 1863, with notice of Lynch's purchase and colluding with Burnett and Alexander B. Hanna and Virginia E. S. Hanna, heirs-at-law of John G. Hanna, whose bond Burnett held, took said title and possession to defraud him, he (Street) never having paid all the purchase money to Burnett; that Burnett's residence was not known, that he resided out of Georgia and had no property therein.

He prayed that Street should be compelled to pay him reasonable rent for said premises, and convey them to him. Discovery, except from the Hannas, was waived. They denied all combination; answering that, as heirs of John G. Hanna, they had accepted from Burnett the *balance of the purchase-money*, and made the deed without notice of the sale to Lynch. Street answered, insisting on proof of the former

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sale, and saying that his purchase was *bona fide*, and without notice of Lynch's pretended purchase. When the cause came on for trial, the Judge having been of counsel, by consent, Col. C. D. McCutchen was made Judge *pro hac vice*.

On the trial, Lynch testified to said averments in his bill, and further explained them as follows: the stock paid Burnett was a mare at \$250 00, a stallion at \$1,000 00, and a jack at \$250 00, all of which was delivered to Burnett in Tennessee, at the time of the sale; that Burnett then procured one Hoover to keep the jack till Lynch went to Georgia; that Lynch would then carry the jack to Burnett, but this was no part of the trade, this was a private arrangement for which Burnett was to pay Lynch; the bond was drawn by a young man not an adept at such matters; but nothing remained for Lynch to do, he was simply to go to Georgia and get possession of the land and a deed, which deed Burnett said he could and would get at once. He exhibited two plats and grants for said land, which he said Burnett left with him, and upon the faith of them and Burnett's representations, he made the purchase. He said he never brought the jack to Georgia, that the jack got away from Hoover, and was lost. He also testified to the facts stated by the witness, Swader, hereinafter stated.

A. B. HANNA testified: That the lands were worth from \$60 to \$70 *per annum*, for rent, and that Street had had possession of them since the latter part of 1863; that on the 24th of August, 1863, Burnett paid him the note for the balance of purchase-money, which had been transferred to him, \$500 00 and interest in Confederate currency; that Street furnished the money, and was there present, and took the deed, and Street also paid off a judgment held by Stewart, transferee of John G. Hanna, for about \$640 00, which was a lien for another part of the purchase-money for said lands; that Street also paid witness \$200 00 or \$300 00, which Burnett owed him on other accounts, and paid Burnett some other money. All these payments were in Confederate currency, of which it then took \$15 00 to buy \$1 00 of gold.

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HOOVER testified, as had Lynch, as to his contract to keep the jack, and the loss of him. The signature of the witness to the bond was proved, and the bond was read in evidence.

THOMAS SWADER testified: He and Lynch and Lynch's son were traveling together (when is not stated,) and met Street, and Street and Lynch conversed about the Burnett place, and Street told Lynch that he knew he had bought the place from Burnett, and knew the horses which Lynch paid to Burnett; that Street said something about having consulted an attorney before he bought the land, and Lynch might sue him; that Street said he saw a letter from Lynch to Burnett, in which Lynch said he could not comply with his contract, and though he had heard of said purchase, he bought because of said letter.

MRS. BURNETT testified: That she thought her husband was dead; that while he and Street were speaking of making said trade, she told Street that Lynch had bought and paid for the land; that they went off and seemed disposed to conceal their dealings from her; that her husband had a letter, which he said Lynch wrote, stating that he could not comply with his contract, but she knew that it was in the handwriting of Burnett.

LEONIDAS EVANS testified, that he saw Lynch pay said money and deliver said horses to Burnett in payment for said land, just as Lynch testified, except that Evans said the Jack was not delivered but Burnett was to have him whenever he went to Lynch's house for him; that he and one Maupin took said horses to Mrs. Burnett, at Burnett's request, and told Mrs. Burnett, Hugh McKing, Mr. Street and perhaps others of the trade; that soon after, before the 21st of August, 1863, Street and his father came to witness at Robeson's shop, took him out and asked him about said sale to Lynch; witness told him all about Lynch's paying for the land as aforesaid. Street then told witness that he had bought the land from Burnett, and partly paid for it, and would kill Burnett if he did not refund his money, and then, after reflection said he would go to A. B. Hanna, pay the balance of the purchase money and get a deed and then he

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old the land. Street's father said John G. Hanna had administrator, and he feared that would not do, to which replied, that he would risk it. He said he told Hanna the sale, and that it was generally understood and the on talk that Burnett had sold out. He said that, in the conversation, Street said he had told Ashburn of his sale from Burnett, that Ashburn laughed at him and Burnett had sold out before, and referred him to Maupin, he went to Maupin and he referred him to witness.

MAUPIN testified, that Burnett told him he had sold his land to Lynch; showed him the money and stock; that his enquiry of him was after Street's purchase, and that he said he had not paid Burnett in full, and would not make further enquiry; that Street spoke of said letter from Street to Burnett, and said that an attorney, whom he consulted, told him he was safe in making the trade if the letter was genuine. Here the testimony for complainant was

testimony for defendants was substantially this: McCARTHY said, Street consulted said attorney, S. T. Baily, after purchase from Burnett, to know whether it was safe to pay Burnett the balance of the purchase money, and the attorney said it would be, if said letter was genuine.

LYNCH testified, that he did not recollect ever being consulted.

STREET testified to the payments by him to Burnett before made by Hanna, and that he paid Burnett all the balance \$100 00, which was the price except \$1,700 00 in Confederate currency, which, at a fair valuation, he is ready to pay; he took the deed in good faith, without notice of former sale, and after that, on the same day, told Ashburn of said trade, and then first heard of the prior sale; he then saw Maupin, and then Evans, as they testified. A deed was read in evidence; he said the rent of the premises was not worth more than his repairs.

WART testified to said payment made to him by Street from Burnett.

Other witnesses testified that Evans' character was bad, and

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that they would not give full credence to him, that his testimony ought not to be believed, especially in case he were interested. Street's solicitors, while arguing the case, requested the Judge to charge the jury, that, if Burnett had the bond for titles, and had not paid the purchase money Street might lawfully buy the land and pay the purchase money to the obligor or his assigns, and take a deed, and that even if Street had heard rumors of a former sale by Burnett, yet if Burnett had the bond the finding should be for Street; that if Burnett had sold to Lynch before Burnett paid the purchase-money Lynch got neither a legal title nor a perfect equity. The Judge refused so to charge, but charged that if Street had notice of Lynch's purchase at the time of his purchase, the finding should be for Lynch, otherwise for Street, and that if they found for Lynch, they could find such rents as the testimony showed was right. The finding was for Lynch, without rent, and the decree was, that Street should make him a deed to the lands, and that *haberi facias possessionem* issue in favor of Lynch.

The Court immediately afterwards adjourned and the parties and solicitors left. For this reason no motion for a new trial was made.

The solicitors for Street say that said refusal to charge and the charge as given, were erroneous, and that the jury found contrary to law and evidence.

TATUM & DABNEY, for plaintiffs in error.

GRAHAM & WALKER, for defendant in error.

BROWN, C. J.

1. The evidence in this case shows that Burnett had purchased the land in dispute from John G. Hanna and taken bond for titles and had paid him part of the purchase-money. The answers of A. B. Hanna and Mrs. Hanna (the father and widow of John G. Hanna) say that Burnett, when they made the deed to Street, paid the *balance* of the purchase-money, which shows that part of it had already been paid.

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We think Burnett, by the purchase, taking bond for titles and the payment of part of the purchase-money, acquired an equity in the land, which he had a right to sell, and which was the proper subject of purchase by Lynch:

The evidence shows that Lynch, in good faith, bought the land of Burnett, and paid the entire purchase-money, and took bond for titles, and that Burnett deposited with him the rents from the State of Georgia, and promised to return some and pay the balance of the purchase-money to Hanna, and then make Lynch a deed. If Burnett had kept his promise and had paid the balance of the purchase-money to Hanna, Lynch would have had a perfect equity, if not a legal title to the land, the moment Hanna received the balance due for the land. But instead of keeping his promise, Burnett went home and sold the land to Street, before he paid the balance of the purchase-money to Hanna, and he and Street went to the widow and father of Hanna, and Burnett paid the balance due on the estate, and the judgment on the note that had been transferred, with part of the money which Street was to pay him for the bond, and at his request the Hannas made the deed, not to him for Lynch's benefit, but to Street, the subsequent purchaser. Now the whole case would seem to turn upon notice. If Street, at the time he made the purchase, had notice of the sale to Lynch, he took subject to the rights of Lynch, and held the land as a trustee for Lynch, and the most he could claim was, that Lynch pay him the amount of balance of purchase-money paid by him to Hanna, when he was bound to make Lynch a deed and deliver the possession to him. See Code, § 36; Story Eq. Jurisprudence, secs. 395-400.

Does the verdict in Lynch's favor, compensate Street, his trustee, for the money he paid to Hanna to perfect the title which the finding requires Street to make to him? We think the evidence is sufficient to sustain the verdict on that ground. The balance due for purchase money was \$1,141 00. This Street paid in Confederate Treasury notes, worth, when paid, fifteen for one in gold. The amount in gold which Street paid 24th of August, 1863, was, therefore, only \$76 00.

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Add five years and three months' interest, \$27 93, and we have \$103 93. To this add one-third for the difference between gold and Federal currency, \$34 64, and the total amount is, \$138 67 in currency. The evidence shows that Street took possession of the land in the latter part of 1863. Hanna swears the place was worth, for rent, \$60 00 to \$70 00 per annum.. Now if no charge is made till the end of the war, Street is still chargeable for the rent for 1865-6-7 and 8, four years, which would amount to more than the value of the Confederate money paid by him with interest and premium added.

2. The Judge charged the jury, that if Street had notice of Lynch's purchase at the time of his purchase, the finding should be for Lynch; otherwise it should be for Street. We see no error in this charge; and as the evidence as to the time when Street received the notice is in conflict, and the jury found for Lynch, we see no reason why we should disturb the verdict.

But it is insisted that the Court should have charged as to the effect of rumors as notice. We are not prepared to say that there is lack of sufficient positive evidence of notice. But whether that be true or not, when the Court gave the above charge, if the counsel for Street were not satisfied with it, they should have asked the Court, in writing, to charge specifically on the effect of rumors as notice; and having failed to do so, they are presumed to have acquiesced in the charge as given. 10 Ga., 262; 13 Ga., 34; 20 Ga., 528; 26 Ga., 374; 28 Ga., 216; 37 Ga., 102.

After looking carefully into the whole case, we think substantial justice has been done, and that the law has been faithfully administered.

Judgment affirmed.

McConnell vs. Bryant.

WM. McCONNELL, plaintiff in error, vs. STARLING H. BRYANT, defendant in error.

Where the affidavit and counter-affidavit are filed in a proceeding to foreclose a mill-wright's lien on a mill, and the issue which is formed by the affidavit, is returned to the Court, and is pending on the appeal, and at the hearing the defendant is not present, and his counsel abandon his case, because their fees are not paid; the Court should require the plaintiff to make out his case, as in other cases in default, by *prima facie* proof of the justice of his claim, before he is permitted to take judgment; and it is error to order that the defendant's affidavit be dismissed, and that the execution, which issued upon plaintiff's affidavit, proceed.

Mill-wright's lien. Practice. Decided by Judge POPE. Fulton Superior Court. October Term, 1868.

Starling H. Bryant made affidavit that, "as a mill-wright, he claims a lien on a certain saw-mill" on Terrell creek, on land lot 248, seventeenth district in said county, "for personal services and labor performed as such mill-wright, in the building of said saw-mill for William McConnell;" that "he claims to be due him as such mill-wright, as aforesaid, for such personal service and labor as aforesaid, from said Wm. McConnell, the owner of said saw-mill," \$150 50, etc.

The Justice of the Inferior Court, before whom this affidavit was made, ordered the Clerk of said Court to issue a *fi. fa.* "against said McConnell and said saw-mill" for said sum and costs. In what shape the *fi. fa.* issued does not appear by the record. To arrest this *fi. fa.*, McConnell made his affidavit that he did not owe the money claimed by said Bryant, and that the *fi. fa.* was proceeding illegally, because it was not in accordance with the statutes for such cases provided.

The parties were at issue and the cause on the appeal. When it was called, counsel of record for McConnell stated that McConnell was not present, had made no arrangements to pay their fee, and that they would no longer represent him. Plaintiff's attorney introduced no testimony and took no verdict, but moved to take an order that defendant's affidavit be

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dismissed, that the *fi. fa.* proceed as if no defence had been filed, and that plaintiff have leave to enter judgment for costs. The order was granted.

Attorneys, employed since the Court, representing McConnell, appear and say the Court erred in passing said order, in not requiring plaintiff to make out his cause before the jury, in not dismissing the proceeding, because it contained no items or particulars of his said services, and because it did not state that plaintiff is a mill-wright, because the *fi. fa.*, was against the land when the order of the Justice was that *fi. fa.*, should issue against the saw-mill, and because land can not be sold under a *fi. fa.* to enforce a mill-wright's lien.

ARNOLD & BOYLES, for plaintiff in error, cited in support of the 1st and 2d points, Irwin's Code, sections 1970, 1973, 3405; 37 *Ga. R.*, 63; on the 3d ground, Irwin's Code, sections 1969, (3), 3453; 6 *Ga. R.*, 159, 168 (1); 7 *Ga. R.*, 57; 30 *Ga. R.*, 474—(5); 1 *Kelly, (Ga.) R.*, 317; on the others, Irwin's Code, sections 1973, 1969 (3), 3581; 19 *Ga. R.*, 163.

HILL & CANDLER, for defendant in error, cited Irwin's Code, sections 3616, 4002, 3230, 1962, 559; Act of 1841, Cobb's Dig. 428; 20 *Ga. R.*, 108, and 19 *Ga. R.*, 163.

BROWN, C. J.

The defendant in this case filed the affidavit authorized by the statute, which, with the plaintiff's affidavit, in the language of the statute, formed "an issue to be returned to the Court, and tried as other causes." See Revised Code, sec. 1970, 1972.

When the defendant, McConnell, failed to appear and defend, as the issue was pending in the Court on the appeal, the plaintiff had a right to proceed *ex parte*, to make out his case. But he was bound to make out a *prima facie* case, by evidence to the jury, before he was entitled to a judgment. And after the issue was made up in Court, he had no right to proceed further with his affidavit or execution; till he obtained a judgment, and sued out an execution upon that judgment.

Webb *et al.*, vs. Harp.

We think the Court erred in ruling that the defendant's affidavit be dismissed, and that the execution proceed, and we, therefore, order that the judgment be reversed, and that the cause be remanded for another hearing.

MARTHA WEBB, *et al.*, plaintiffs in error, vs. LAFAYETTE HARP, defendant in error.

Where a plaintiff in *fi. fa.* had a lot of cotton, mules, etc., levied upon, and pending the levy, it was agreed between him and the defendant, that he should release the property from the levy and return it to the defendant, and should enter the execution fully satisfied, in consideration, that defendant would convey to him a tract of land, with certain personal property, in payment of the *fi. fa.*, and in compliance with said agreement, plaintiff released and restored the property levied upon, which was sufficient to have satisfied the *fi. fa.*, to the defendant, and the defendant delivered to the plaintiff possession of the land and personal property, and turned over to him the title papers, and was to make him a deed as soon as they could get it drawn, and defendant died soon after, without making the deed, and his widow, who was admitted to be insolvent, after the end of the year, finding the premises vacant, took possession, claiming the land for her husband's estate, and commenced proceedings in the Superior Court to have her dower allowed out of the same, there being no legal representative of her husband's estate, and plaintiff filed his bill alleging these facts, and praying that she be restrained from trespassing upon the land, and from prosecuting her action for dower, until a legal representative of the estate was appointed: *Held*, that it was not error in the Judge who granted the injunction to overrule a motion to dissolve it, and to hold it up, until the hearing of the bill, placing his decision on the ground of restraining the trespass above.

Injunction against trespass. Before Judge Worrill.
Chattahoochee Superior Court. March Term, 1869.

Harp, by his bill, made this case: In 1868 he owned a judgment against E. G. Webb, amounting to say \$1,200 00 and had the *fi. fa.*, founded on it, levied upon seven bales of cotton, two mules, a tract of land, and other of E. G. Webb's property, sufficient to pay the *fi. fa.* At the date of the levy

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cotton was worth ten or twelve and a half cents per pound. By military order, sales under *fi. fas.* were prohibited. The price of cotton was much higher in the spring, and then E. G. Webb and he made the following contract: Webb proposed to convey to him lot of land No. 18, in the 5th district of said county, in full payment of said judgment. Harp proposed to release the personalty levied on, and that the sheriff should return it to Webb, and then to satisfy the judgment, if Webb would convey to him said lot, and give him also \$50 00, a cotton-gin, a wheat-fan, and an order on the county treasurer for \$30 00. Webb accepted this proposition, and in pursuance of the contract, paid Harp the \$50 00, delivered him the order, the gin and the fan, and his chain of title to said lot, and possession of the lot, and received back the personalty levied on from the sheriff by Harp's consent. Harp released the personalty from the *fi. fa.* At that time cotton had advanced, and the personalty alone was worth sufficient to pay the judgment. The sheriff had other younger judgments against Webb, and had his property been sold by the sheriff, all its proceeds would have been exhausted by the judgments. By said trade, Webb sold the cotton for a large price, and with the proceeds and mules supported his family. Webb, at the time of said contract, agreed to make Harp a deed to said lot, but because of said younger judgments, such a deed would not make Harp's title good, and, therefore, Harp and Webb agreed that said lot should be sold under Harp's *fi. fa.*, that Harp should buy it, and thus perfect the title. The Stay-Ordinance of the Convention of 1867-8 prevented this sale, and before a sale could be made, Webb died.

He left a wife, Martha Webb, and several children, one of whom, Wesley, perhaps, was of age. No one has administered on Webb's estate; the estate is insolvent, and so are said Martha and Wesley. Said Martha, without the knowledge or consent of Harp, took possession of said lot and she and Wesley are preparing to cultivate it. If they do this, it will damage Harp \$75 00. Besides this, said Martha has applied to the Superior Court for an assignment of dower out of

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d lot. Because the release paid the judgment, because it is kept open in fact only to perfect the title, and because of said insolvency, Harp prayed that Martha and Wesley should be enjoined from trespassing on said lot by cultivating it or otherwise depriving Harp of the free use of it.

The injunction was granted. Defendants moved to dissolve it, because there was no equity in the bill, because Harp was not entitled to the relief prayed for and because the injunction was improvidently granted.

The Chancellor overruled the motion, solely upon the ground that the defendants should be restrained from said trespass. This is brought here for review.

BLANDFORD & MILLER, (by JAMES RUSSEL) for plaintiffs in error.

E. G. RAIFORD, D. H. BURTS, *contra*, cited Irwin's Code, section 3153; 36 Ga. R., 76, 97, 659, as to the power and creation of the Chancellor in such cases.

BROWN, C. J.

From the report of this case, and the head note, (which contains the written decision made by this Court during the term,) there is no difficulty in understanding the point decided without further elaboration here. The complainant's bill sets up a strong equity in his favor, and, as it is admitted that the defendants, who have taken possession of, and are trespassing upon the property, are insolvent, and unable to respond in damages, we think the Court did not err in refusing to dissolve the injunction on that ground. See Revised Code, section 3153.

Judgment affirmed.

Powell vs. Parker *et al.*

JAMES POWELL, plaintiff in error, vs. BEVERLY D. PARKER, *et al.*, defendants in error.

1. An injunction will not be granted for fraud, unless the bill sets forth the specific acts of fraud upon which it is sought ; a general allegation of fraud is insufficient.
2. An injunction will not be granted to restrain the sale, by defendant, of his railroad stock, and the drawing of the dividends by him, on the ground that complainant holds his covenant of warranty of title to a lot of land, the title of which is in dispute, in an action of ejectment, when the bill shows that the railroad stock and other property of the defendant, is of much greater value, than the sum for which he may become liable on his warranty, and there is no charge that he is beyond the jurisdiction of the Court, or that he is insolvent, and when no other sufficient equitable ground is stated in the bill.
3. When the Chancellor, on the bill being presented to him, ordered that the defendants show cause on a day mentioned, why an injunction should not be granted, and that *in the meantime* the defendants be enjoined, till the further order of the Court, and on the hearing, the Judge refused the injunctions: *Held*, that the temporary injunction expired of its own limitation when the injunction was refused at the hearing, and that no vitality could be given to it pending the proceedings in this Court, by bond given by complainant, which is claimed to operate as a *supersedeas* of the judgment refusing the injunction.

Equity. Injunction. Decided by Judge HARRELL. Randolph Superior Court. November Term, 1868.

Powell, by his bill, complained as follows : In 1862, Parker sold and conveyed to him a settlement of lands in Sumter county, Georgia, containing five hundred acres, more or less, with valuable improvements, for \$5,500 00 cash. Parker had been in possession of the land for several years, and put Powell in possession when the contract was made. Land lot No. 127, is part of this settlement, and between two other land lots therein, and the loss of No. 127 would greatly injure the place. When he bought, Parker told him that he was sued for No. 127, by Webb & Moore *et al.*, but assured him that there was no difficulty about a speedy and sure termination of the suit in his favor ; that he would warrant the title, and attend to the whole matter. Powell knew nothing about said suit, but relied exclusively upon the state-

ments of Parker about it. Parker neglects and refuses to defend the suit, saying he has lost all his property, and is unable to defend it, and has informed the attorney whom he had employed to defend it, that he need defend no longer. Powell does not know the result of that suit, and the plaintiff therein is about to make him a party to make him liable for mesne profits.

Powell is informed and believes that Parker has parted with most of his property which was subject to levy and sale, except his residence, and, if there should be a verdict for mesne profits against Powell, he would have no adequate common law remedy to reimburse himself. "It is fraudulent in Parker to decline and to refuse to continue the defense of said ejectment, and in transferring of his property to defeat the equitable right" of Powell. Powell is informed and believes that Parker owns shares in the South-Western Railroad Company to the amount of \$15,000 00 or \$20,000 00, which, by law, cannot be levied on and sold. Therefore, he prays that Parker be enjoined from transferring his stock or receiving its dividends, and that said company be enjoined from recognizing such transfer, or paying the dividends.

The Chancellor ordered Parker and the company to show cause on a named day, why the injunction should not be granted, as prayed for, "and that in the meantime they and each of them abstain and desist from any and all interference or disposition of said railroad stock therein named, until the further order of the Court, under a penalty of \$10,000 00 each."

The defendants demurred to the bill on the following grounds: Because complainant claimed no interest, right or title present or prospective in said stock; his redress at law is adequate; there is no sufficient charge of fraud; there is no averrment of present or anticipated insolvency; no right of action has accrued to the complainant against Parker, etc.

The Court sustained the demurrer, thereby refusing the injunction. The complainant's solicitor assigns said ruling as error. It is stated that he claimed that by the original order, and by his *supersedeas* of the judgment of the Chan-

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cellor, the temporary injunction was still subsisting, and averring that the Chancellor would not so hold, invoked the decision of this Court upon that point.

W. A. HAWKINS, for plaintiff in error.

WEST HARRIS, A. HOOD, for defendants in error.

BROWN, C. J.

1. This bill contains no specific charge of any particular acts of fraud, or fraudulent practices by the defendants, and in the absence of such specific allegations an injunction should not be granted for fraud perpetrated by the defendants, even in a case where the injury might be irreparable. If the complainant fears irreparable injury from the fraudulent acts of the defendants, he must set forth plainly and distinctly the grounds of his apprehension.

2. There is no charge in this bill that the defendant Parker is beyond the jurisdiction of the Court, or that he is insolvent. The allegation is, that Parker has parted with most of his property, which is subject to levy and sale, except his residence. This may be true, and he may still be abundantly solvent. The bill does not show how much property he had or how much is left after he has parted with most of it. The purchase-money of the entire tract of land is only \$5,500, and the litigation about the title applies to but one lot—the most important one, it is said—but the damage in case of failure of title to that lot would be considerably less than the whole sum paid for the tract, consisting of several lots and parts of lots. In addition to the other property, whatever it may be, which it is admitted Parker owns, the bill states that he is the owner of \$15,000 to \$20,000 of the capital stock of the South-Western Railroad Company. This, without reference to his other property, is much more than enough to pay any damages that the complainant may expect to recover in case of a failure of the title to the lot of land in dispute.

The bill further alleges that the railroad stock, by law, is

not subject to levy and sale. This allegation seems to have been made without reference to section 2584 of the Revised Code, which provides that such shares may be levied on and sold, either under attachment or *fi. fa.*, in any county through which the railroad passes. We think the Judge did right in refusing to grant the injunction, as the bill sets up no sufficient equity to entitle the complainant to it.

3. In this case, the Judge ordered that the defendants show cause, on a certain day, why an injunction should not be granted, "and that in the meantime, they and each of them, abstain and desist from any and all interference or disposition of said railroad stock therein named, until the further order of this Court, under a penalty of ten thousand dollars each." It is claimed that this temporary injunction was such a judgment of the Court below, as may be continued in force till the hearing in this Court, by bond given to operate as a *supersedeas* of the judgment refusing the injunction. We think not. The temporary injunction expired of its own limitation when the Judge, on the hearing, refused to grant the injunction, and no further vitality could be given to it, nor was it continued in force pending the proceedings in this Court, by a *supersedeas* of the judgment refusing the injunction upon the hearing.

The writ of injunction is harsh remedy, and should only be granted in cases, where the parties applying for it show themselves clearly entitled to it under well settled rules of legal equity. Again, the Chancellor has a large legal discretion in granting, or refusing, or dissolving injunctions, which should not be controlled by this Court except in cases of manifest abuse of that discretion. Temporary injunctions are frequently granted by the Chancellor on an *ex parte* showing, to prevent supposed injuries till both sides can be heard. And it might work great mischief if they could be continued in force till a hearing in the Supreme Court, by virtue of the bill of exceptions, operating as a *supersedeas* of the judgment refusing the injunction on the hearing.

We do not think section 4203 of the Revised Code was intended to apply to orders of this character, or that they

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are continued in force by the bill of exceptions operating as a *supersedeas*, when bond is given under said section. They are interlocutory orders of the Chancellor, which cease to operate when his order sets them aside. In this case, the Chancellor ordered that his judgment refusing the injunction "operate as a limit" to the temporary injunction, which had heretofore been granted to hold till the further order of the Court. We see no error in this. We hold that the temporary injunction ceased to operate from the time when said order was granted.

Judgment affirmed.

DOE, *ex dem.*, TUGGLE and wife, *et al.*, plaintiffs in error, vs.
ROE and JOHN H. MCMATH, *et al.*, defendants in error.

(MCCAY, J., having been of counsel in this cause, did not preside.)

A grant issued to Isaac O. Holland, orphan. It appeared by parol that there was no such person as Isaac O. Holland, orphan, in the district at the time of giving in for draws, but that Isaac O. Holland's orphan, Mary Holland, was in the district and did give in for a draw: *Held*, that parol evidence of these facts, may be given to the jury, not to prove a mistake in the name of the grantee, but to give effect to the grant, by identifying the person intended as the grantee.

Ejectment. Explanation of grant. Decided by Judge CLARK. Sumter Superior Court. April Term, 1869.

This was ejectment in favor of Doe on the several demises of Benjamin F. Tuggle and his wife, formerly Mary O. Holland, and H. S. and Eli S. Glover, executors of Eli Glover, deceased, against Roe, casual ejector, and McMath and John Teal, tenants, for lot of land No. 240, 26th district of said county.

The plaintiff read in evidence a grant of said lot from the State to "Isaac O. Holland, orphan," of Wilder's district, Jasper county, Georgia, dated 8th of November, 1837, the will of Eli Glover, deceased, and the letters testamentary on

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his estate to said H. S. and Eli S. Glover, as his executors. They then proposed to show, by witnesses, the following facts: that no such person as Isaac O. Holland ever lived in said district; that Mary Holland did live therein at Lawson Holland's, till she married Tuggle; that Isaac O. Holland lived in Virginia, and died there in 1812 or 1813; that he was a brother of said Lawson Holland; that said Mary was the daughter of said Isaac O., and was an orphan; that she came to Georgia about 1819, lived in said Wilder's district in 1825-6-7, and when the draws were given in for. The object of this testimony being to show that the grant should have issued to Isaac O. Holland's orphan, Mrs. Tuggle, it was objected to and ruled out. The plaintiff, being unable to make out title without this explanation, was non-suited.

The rejection of said oral evidence is assigned as error.

JAS. J. SCARBOROUGH, (by S. H. Hawkins and Judge Richard H. Clark,) said that the evidence was admissible, citing *Bowen & Bowen vs Slaughter and Brown*, 24 Ga. R., 338; *Walker vs. Wells*, 25 Ga. R., 141; *Brooking vs. Dearmond*, 27 Ga. R., 58'; *Sykes vs. McRory*, decisions of March Term, 1861, at Atlanta, 223. They said *Martin vs. Anderson*, 24 Ga. R., 301; Code, sec. 2330; *Patterson vs. Buchanan*, 37 Ga. R., 560, should be closely scrutinized. Act of 1857 was of force in 1860, and is adopted by Art. XI, sec. 3.

W. A. HAWKINS, for defendant in error, cited Code, sec. 2321, 10 Ga. R., 470; 11 Ga. R., 282.

BROWN, C. J.

Upon the authority of the former rulings of this Court, we are satisfied the parol evidence should have been allowed to go to the jury, to show that there never was any such person as Isaac O. Holland, orphan, in the district when the draw was given in, but that Isaac O. Holland's orphan, Mary Holland, who, with her husband, is the plaintiff in this case, did live in said district, and did give in, and draw the lot of land in dispute.

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This presents the case of a latent ambiguity, and parol evidence is admissible, not to prove a mistake in the name of the grantee, but to give effect to the grant, by showing the person intended as the grantee. See *Bowen, et al., v. Slaughter, et al.*, 24 Ga., 338; *Walker vs. Wells*, 25 Ga., 141; *Brooking vs. Dearmond*, 27 Ga., 58; *Sykes vs. McRorey*, decisions at Atlanta, March Term, 1861, not yet published.

While there is some apparent conflict in the decisions on this question, we think those above cited lay down the correct rule, and we follow them.

Judgment reversed.

D. H. BALDWIN, executor, plaintiff in error, vs. ARCHIBALD B. MCCREA, defendant in error.

(McCAY, J., having been of counsel in this cause, did not preside.)

When a bill was filed for a new trial, in an action of ejectment, on the ground that the witness by whom the defendant proved adverse possession for the legal period, has since refreshed his recollection, and will now testify that he was mistaken as to the time when the possession commenced, and the bill was dismissed for want of equity, and that judgment was affirmed in this Court; a motion for a new trial, made at a subsequent term of the Court in the same case, on the same ground, will not be entertained by the Court. The question is *res adjudicata*.

Motion for new trial. Decided by Judge CLARK. Sumter Superior Court. February Term, 1869.

This is the same case reported in 37 Ga. R., 48, (*Jones vs. McCrea*,) with this exception: After the Supreme Court had affirmed the judgment of the Court below holding that a new trial could not be obtained by the bill for the reasons given therein, the counsel moved, at law, for a new trial upon the same ground. The Court overruled the motion, and that is assigned as error.

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J. H. HAWKINS, for plaintiff in error, cited the Code, sections 3668, 3670; *Taylor vs. Sutton*, 15 Ga. R., 103; *Tarver vs. McCay*, *Ib.*, 550; Graham on N. Trials, 573—4; *Nuck & Orr vs. Hawkins*, *ante*, 174; *Moore vs. Ulm*, 34 Georgia Reports, 565; *Augusta Manufacturing Company, Wilbur*, 31 Georgia R., 365; 11 Ga. R., 313; *Gant & Pherson vs. Carmichael & Co.*, 31 Ga. R., 737; *Candler Hammond*, 23 Ga. R., 493; *Grady vs. Hightower*, 17 Ga. R., 253, and reversed; *Jones vs. McCrea*, 37 Ga. R., 48, and *Mischell vs. Printup*, 25 Ga. R., 182.

JAMES J. SCARBOROUGH, by W. A. HAWKINS, for defendant in error, cited, *Jones vs. McCrea*, 37 Ga. R., 48, and that this matter was *res adjudicata*.

BROWN, C. J.

We see no cause for complaint at the decision of this case, 37 Ga. R., 48. That ruling is sustained by *Mitchell vs. Printup*, 25 Ga. R., 182, and by *Beard vs. Simmons*, 9 Ga. R., 4. The other application for new trial, in this case, was made upon the identical ground set forth in this application, and was overruled by this Court. A party can not avoid the effect of a solemn adjudication of his rights in a Court of competent jurisdiction, by a change of *forum*, from the equity to the law side of the Court. The maxim "*res judicatae veritate accipiuntur*," is applicable.
Judgment affirmed.

Moody *et al.*, vs. Ronaldson.

F. P. MOODY *et al.*, plaintiff in error, vs. A. G. RONALDSON, administrator, defendant in error.

1. Under section 4005 of the Revised Code, the administrator of the deceased landlord may make the affidavit and institute the proceedings to dispossess a tenant who holds over.
2. When the affidavit is made by the administrator, a counter-affidavit filed by the tenant, that he does not hold the premises either by lease, rent, at will, by suffrance, or otherwise, from said Ronaldson (the administrator) or from any one *under whom he claims the premises*, or from any one claiming the premises under him, is a sufficient compliance with the statute, and it was error in the Court to refuse to allow the issue thus presented to be submitted to a jury, and to order the sheriff to proceed to dispossess the tenant.

Landlord and tenant. Decided by Judge CLARK. Summer Superior Court. April Term, 1869.

Ronaldson, as administrator of Josiah Moody, made an affidavit that his intestate leased a certain lot of land to Mrs. "F. P. Moody and her child, Edward Moody," for a term which had expired, and that they, upon demand made, had refused to give him possession of the premises. Process issued to put them out, and Mrs. Moody tendered to the sheriff her counter-affidavit, in which she swore that she did "not hold the premises, either by lease, rent, at will, by suffrance or otherwise, from the said Andrew J. Ronaldson, or from any one under whom he claims the premises, or from any one claiming the premises under him," and gave bond accordingly, signed by her only. The bond and affidavit were witnessed by the Judge of the Superior Court. The sheriff took this affidavit and bond and returned the cause to Court.

When the cause came on for trial, plaintiff's attorney moved to dismiss said affidavit and bond of Mrs. Moody, because it was not according to the statute for such cases provided. Her counsel said it was sufficient, but proposed, if the Court thought it insufficient, to amend it by inserting after "Ronaldson" the words "either personally or as administrator of said estate," and also produced and proposed

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to file the affidavit and bond of said Edward Moody according to law. The Court refused to allow the amendment made, or to allow Edward Moody's affidavit and bond to be filed.

The defendant's attorney then moved to dismiss the original proceeding upon the ground that such proceedings could not be instituted by an administrator. The Court overruled his motion, and ordered the sheriff to proceed to eject Mrs. Moody and her son, and to put said Ronaldson in possession.

The refusal to allow the amendment, to allow the affidavit and bond of the son to be filed, to dismiss the proceeding and his final order, are all assigned as error.

HAWKINS & BURKE, for plaintiffs in error.

N. A. SMITH, for defendant in error, cited Code, secs. 220, 2449; *Conyers vs. Kennon*, 1 *Kelly*, (Ga. R.), 379; *Woffe vs. Flannagan*, *Ib.*, 541; *Richardson et al., vs. Harvey, administrator*, 37 *Ga. R.*, 224, as to administrator's right to recover the land. He said the affidavit and bond were made because by Mrs. Moody only when the proceeding was against her and another, and was witnessed by the Judge of the Superior Court instead of the sheriff; Code, secs. 4006, 4007: Amendment was not allowable, Code, secs. 3430, 453, *Cardin vs. Standley*, 20 *Ga. R.*, 105; *Perry vs. Martin*, 26 *Ga. R.*, 477; *Beall vs. Blake*, 13 *Ga. R.*, 217.

BROWN, C. J.,

1. Under section 4005 of the Revised Code, when a tenant holds over, the owner, his agent, or attorney at law, or attorney in fact, may demand possession of the premises, and if the tenant refuses or omits to deliver the possession when so demanded, may go before the Judge of the Superior Court, or any Justice of the Peace, and make oath of the facts. When said affidavit has been made, the next section provides that the officer before whom it is made, shall grant and issue a warrant or process, directed to the sheriff or his deputy, or any lawful constable of the county where the land lies, com-

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manding and requiring him to deliver to the owner or his representative, full and quiet possession, etc.

We think a just and fair construction of these sections authorizes the administrator of a deceased owner, who represents him, and is, in fact, for the purposes of paying debts and of distribution, the legal owner of the lands of the estate which he represents, to make the affidavit, and institute the proper proceeding to expel the tenant who holds over, and refuses to surrender the possession on demand.

2. Section 4007 provides that the tenant may arrest the proceedings and prevent the removal of himself and goods from the land by declaring, on oath, among other things, "that he does not hold the premises, either by lease or rent, or at will, or by suffrance, or otherwise, from the *person* who made the affidavit on which the warrant issued, or from any one *under whom* he claims the premises, or from any one claiming the premises under him. The counter-affidavit of the tenant in this case, followed the language of the statute as above quoted, and was, in our opinion, sufficient. As we hold that the administrator, as the representative of the owner, and for certain legal purposes himself the owner, may make the original affidavit, and commence the proceeding, it follows that the tenant may treat him as owner, in the counter-affidavit, and he has no right to complain. The affidavit, in this case, states not only that the tenant does not hold by lease, etc., from said Ronaldson, (the administrator,) but that she does not hold from any one under whom he claims the premises. This is all the statute requires. We think the Court erred in dismissing the affidavit of the tenant, and in ordering the sheriff to put the administrator in possession. The issue, made up by these affidavits, should have been submitted to a jury, as required by law.

Judgment reversed.

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MOSES P. GREEN, executor, plaintiff in error, *vs.* **JOHN ANDERSON**, defendant in error.

1. When a testator, who died in 1853, by will, directed that his executors cause to be removed to a free State, and *there* emancipated, his negro boy John, and that the executors pay the expense of his removal, and for his reasonable support and schooling, until he is put to a trade, and when, if he do, he reaches the age of twenty-one years, they invest and secure, for his benefit, as they may deem best, the sum of three thousand dollars, to be raised out of the estate: *Held*, that such devise constituted a legal trust, which neither contravened the policy of the State at that time, nor the present time.
2. It was the duty of the qualified executor, to execute this trust, and his failure to do so, till after John was twenty-one years of age, and his detention in Georgia, as a slave, by the executor, did not destroy the trust, or prevent its execution at a later period. Equity considers that done which ought to be done, and directs its relief accordingly.
3. Slavery having been abolished in Georgia, and freedom having come to John, when he was not permitted to go to it, as directed by the will, and promised by the executor when he assumed the trust, he being *ex jure* with the right to litigate, in the Courts of this State, may, in his own name, (as he is over twenty-one years of age), proceed in a Court of equity, to compel the execution of the trust, in accordance with the will, or as nearly so as the changed condition of the country will permit, and to recover, not only the legacy, as provided by the will, but such reasonable compensation, for the support and education, which the will gave him, as the Court may find due and unpaid.
4. While a freedman may, in the Courts of this State, enforce any legal equity which was created in his favor, while a slave, that did not then contravene the policy of the law, he can not maintain an action for injuries which he may have received, or for wages on account of labor done by him, while he was a slave.

Manumission. Emancipation. Decided by Judge GIBSON. Burke Superior Court. May Term, 1868.

Augustus H. Anderson, of Burke county, Georgia, died in 1853, testate. The will was as follows:

ITEM 1st provided for the payment of his debts.

ITEM 2nd loaned to his wife certain slaves, and furniture, during her life, gave her a carriage and horses and the privilege of using his residences in Burke and Richmond counties, until the 1st of January, 1875, if she lived to that period.

ITEM 3d gave to one Bugg, the right to reside at his place, "Forehand," as long as he wished, etc.

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ITEM 4th gave to Augustus Anderson, son of one Murphy, \$500 00, to be held by Murphy for his use.

ITEM 5th gave to Adam and Maria, two old slaves, \$20 00 each, *per annum*, and provided for their kind treatment.

ITEM 6th was as follows: "I desire and direct that my executors cause to be removed to a free State, and there emancipated, John, son of my negro woman slave, Louisa; that they pay the expenses of such removal, and for the reasonable support and schooling of said John, until he is put to a trade, and that when, if he do, reach the age of twenty-one years, they invest and secure for his benefit, as (they) may deem best, the sum of three thousand dollars, to be raised out of my estate."

ITEM 7th was as follows: "I desire and direct that my negro slave, Louisa, mother of said John, shall be kept at my Burke plantation till the 1st of January, 1875, that she be kindly treated and provided for, that she be employed as a seamstress as heretofore, and that she be paid by executor, annually, until that time, the sum of fifty dollars, if she choose then (in 1875) to go to a free State and be emancipated, my executors are directed to carry out her determination, and to invest and secure for her use, as they may think best, two thousand dollars, to be raised out of my estate, the interest of which she is to receive during her life, and then her son John, if in life, is to have the benefit of said investment absolutely. If said slave, Louisa, shall determine not to go to a free State, then I give her to my son-in-law, Moses P. Green, if then in life, or if not, to any one of the children or decendants of my daughter Martha, that said slave may select as her owner."

ITEM 8th gave to Moses P. Green absolutely the slave before loaned him, with privilege of using any of testator's land till 1st January, 1875, *gratis*.

ITEM 9th appropriated \$100 00 *per annum* till 1st January, 1875, to pay a missionary for his slaves.

ITEM 10th provided that the residue of his estate, with the wife's legacy, after her death, should be kept together till the 1st of January, 1875, etc.

ITEM 11th provided that the net income of the estate

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After paying legacies, should be paid one-third to his wife during life, one-third to said Greene during his life, remainder to Greene's wife and then to the guardian of her children, and that the other third should be held by the executors for the uses, etc., specified in the 12th item; his wife's third, after her death, was to be divided in halves and go as the other thirds.

ITEM 12th provided that the income from 11th item should be invested as the executors thought best, to be paid to his daughter, Susan, or her children, as they needed it, and on the 1st of January, 1875, this fund to be paid to her children or their descendants.

ITEM 13th provided that, on the 1st of January, 1875, the residue of the estate not disposed of, if his wife was then dead, be divided into halves, one-half to go to Martha's children and the other to Susan's children, on terms specified.

A provision was also made here for the wife, should she be alive in 1875.

ITEM 14th provided that if Susan or Martha were alive on the 1st of January, 1875, and childless, each should take absolutely said half given to her children.

ITEM 15th required the executors to secure the legacies to females to their sole use, unless they thought it not proper to do so.

ITEM 16th provided that if, on the 1st of January, 1875, no person was alive, or represented by lineal (not collateral) descendant, the executors should sell all the property as they thought best, (seeing that the slaves got good masters,) and pay \$10,000 00 to the Georgia Female College, at Macon; \$10,000 00 to the trustees of Emory College, at Oxford; \$20,000 00 for the endowment of a free school of Brigham's district, Burke county; \$20,000 00 for the endowment of another such school near Lester's district, in said county; and the executors were to see that necessary acts of incorporation were had for these purposes; any balance was to be used in building and endowing a college, under the control of the Methodist denomination, at Brothersville, Richmond county, Georgia, etc.

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ITEM 17th nominated Moses P. Green, Charles J. Jenkins, Elisha A. Allen, and Andrew J. Miller, as his executors and testamentary guardians of any legatee who might be a minor when his or her legacy was payable.

The will was admitted to probate. Green, alone of said named executors, qualified as such. This negro, John, was then about twelve years old. In some way, (it does not appear how by the record,) the Superior Court of Burke county had this will, etc., before it, and in 1855 there was a decree, that Green, as such executor, should extinguish Bugg's claim by purchase, that he should, "under the direction of Thomas M. Berrien and Andrew J. Miller, solicitors in this cause, make such provision and investment for the slaves, John, Adam, Maria, and Louisa, and such disposition of them as will substantially carry out the provisions of said will in relation to them;" that Green be allowed to retain, for his own use, such sum out of the estate in his hands, as should, in the opinion of said solicitors, be sufficient consideration for the release of his privileges granted in said 8th item; that Green sell all the land of testator in Burke, and all the slaves thereon, (except Adam, John, Maria, and Louisa,) when and where, and on such terms as Green and the solicitors should agree upon, and that, after paying all legacies and fees, and costs, and making the investments provided for in the decree, the residue shall be invested, under the direction of said solititors, in State stock, or other stocks and securities for the uses and purposes specified in said will; that Green report annually to said Court, his action under the decree: and power was given to enlarge the decree if necessary to carry out the same. Pursuant to said decree, Green proceeded to sell the property; bought most of it himself, and paid the other legacies, etc. But he paid Louisa nothing. She died in 1858 or 1859. He did not execute the will as to John, but he was kept in Georgia and used as a slave until slavery was abolished. He became of age in 1862.

Upon the state of facts, set out in his bill for account against Green, filed in April, 1868, said negro, John, claimed that he should be paid the \$3,000 00, also what it would

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have cost Green to have executed the 6th item of the will, as to John, and also the annuity and legacy given to his mother by the 7th item of said will, with interest according to law.

Green's solicitors demurred to this bill upon the grounds that said 6th and 7th items of the will were void, under the Acts of the General Assembly of Georgia, passed in 1801 and 1818, prohibiting emancipation; because John never has had, nor has any capacity to take under said will, or to compel Green to perform; because John is not, and never was, a citizen of the United States of America, having such rights as to enable him to sue in any State or Federal Court, nor is there any law, State or Federal, giving him a right to sue for any claim arising before emancipation; because the whole will showed that Green had the right to refuse performance of the trusts in items six and seven specified; because, (as to the claim under his mother,) her death defeated any claim which she had, and because, for the reasons aforesaid, she could not take, and, therefore, could not transmit anything. Judge Gibson overruled the demurrer as to John's claim under the 6th item, leaving the other to be determined at the hearing. This decision is assigned as error by Green's solicitors, upon the points indicated in the demurrer.

J. J. JONES and A. M. ROGERS, for plaintiff in error, said the 6th item was void, because of the Acts of 1801 and 1818; Cobb's Digest, 983 and 991; *Miller vs. Lewis*, (unpublished decision of this Court during the war,) if that not so John could not enforce the claim. 14 Ga. R., 198; 20, 510, 511; 23, 453; 26, 631; 2 Hill's Chan. R., 304. The decree is dormant. Code, secs. 2862, 4160. John was no party to it; it can be enforced only by *fi. fa.* or attachment. Code, secs. 4156, 4157. Emancipation gave nothing but freedom. 14 Ga. R., 198; 20, 510; Civil Rights bill, Acts of Georgia, 1865-6, p. 239; Amendment United States Constitution, Art. XIV. This can only act prospectfully. 1 Kent's Com., 501; Constitutions of 1861 and 1865; 34 Ga. R., 483; Constitution 1868.

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E. T. LAWSON and JAMES S. HOOK, for defendant *in error*, replied, that the 6th item was not void, citing 4 *Ga. R.*, 445; 10, 263; 25, 109; Cobb on Slavery, secs. 282-3-4-5, 353-5-6, 364-5-6-7.

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1. The testator, by his will, directed that the boy John be removed to a free State, and *there* emancipated, and that the expense of his removal, and of his reasonable support and schooling, till he was put to a trade, be paid out of the estate by the executors, and when he arrived at the age of twenty-one, the executors were directed to invest and secure for his benefit, the sum of \$3,000 00, to be raised out of the estate of the testator. We hold that this was a legal bequest, and that it constituted a legal trust, which in no way contravened the policy of the State of Georgia at the time the will was made, or at the present time. I will not enter into a discussion of this question. It has been so ably discussed, and the rule so firmly established by this Court in a number of previous cases, as to render it a work of supererogation on my part. See *Vance vs. Crawford*, 4 *Ga.*, 445; *Cooper v. Blakey*, 10 *Ga.*, 263; *Sanders vs. Ward, et al.*, 25 *Ga.*, 109. And see Cobb on Slavery, secs. 282-3-4-5, 353-5-6, 364-5-6-7.

2. The position being established that this was a legal trust, it follows that it was the duty of the qualified executor to execute it. Indeed, it was his sworn duty to execute it. His oath, as executor, bound his conscience to its faithful performance, and I have the authority of the late learned Chief Justice of this Court for saying, that this is a rare exception to the rule, which is, that executors or trustees have been faithful to their oaths in the execution of similar trusts. In *Sanders vs. Ward, et al.*, 25 *Ga.*, 121, Judge Lumpkin, in replying to the objection that such trusts could not be enforced, as slaves, as such, could not sue to have them executed, says: "This suggestion has been urged again and again, in connection with the point under consideration,

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the slave States—in Alabama, Mississippi, South Carolina, Virginia, as our own past decisions show—and has been iably overruled. Trustees are selected by the testator, count of the confidence reposed in them, and usually will discharge their duty. And if there be doubts, will apply to the courts for direction. However faithful we may be to the living, we are rarely so to the dead. If the heirs move in the matter, this will give the courts occasion for action, and they will compel, by their decree, an execution of the trust. How many trusts of this sort all over the States, and in this State, have been executed? Have they failed for want of fidelity in the trustee? This objection is imaginary.” Had the learned Chief Justice lived to try this case, he would have been compelled to admit that at least one exception to the rule that we are not faithless to the dead exists, and that the objection is not in every case imagi-

It did the failure of this executor to execute this will, in defiance of the solemn oath which he had taken, and his conduct in retaining John as a slave in this State, in palpable violation of what he knew to be the wish and will of his father-in-law while in life, destroy the trust, and leave the *cestui qui trust* after he came of age, and became free, without a remedy? We think not. Equity considers that which ought to be done, and directs its relief accordingly. Revised Code, section 3031. This trust was a legal

It ought to be executed, and a Court of Equity will direct its relief as to enforce its execution.

But it is insisted that the changed condition of the country renders it impossible to execute the trust, as John has become free in Georgia, and no one has the right to compel him to remain in a slave State, as directed by the will. And it is further urged, with great earnestness, by the learned counsel for the plaintiff in error, that John has the right to sue in the Courts of Georgia, for any legacy given to him while a slave, or for execution of any trust that was created in his favor while he was a slave. While we admit the ingenuity of the argument, and admire the ability with which it was urged, we

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can not subscribe to the proposition as a sound one. It is true, the will can not now be literally executed. By the neglect of the executor, to use the very mildest term, John was not permitted to go to a free State while a minor, as directed by the testator. But soon after he came of age, the free state, by the results of the late unfortunate civil war, came to him. He not only became a free man, but he acquired a *status* in the Courts of the State. He acts for himself, and has the right to litigate with the executor on terms of equality before the law. And, we hold that he now has the right, in a Court of Equity, to call the executor to account, and to compel the execution of the trust in his favor in accordance with the will, or as nearly so as the changed condition of the country will permit, and to recover, not only the legacy left him by the will, but such reasonable and just compensation for the support and education which the will directed that he should have, as may be found to be due and unpaid.

4. It was insisted that the rule which we have adopted in this case, if announced, would lead to an immense amount of litigation, as it would authorize freedmen to maintain suits in the Courts of this State, for injuries done to their persons while they were slaves, and for wages during the same period. We anticipate no such results. There is a very broad distinction between the rule which we maintain and the one which counsel insists will follow as a necessary consequence. We hold that a freedman of legal age, may commence proceedings to enforce, in the Courts of this State, any existing legal or equitable right, created in his favor while he was a slave, that did not then contravene the policy or violate the laws of the State. If, in other words, a legal trust was created in his favor, while he was a slave, which he had no right to ask the Courts to enforce, but which it was the right and duty of an executor or trustee to execute, or to enforce in the Courts for him, he may now institute proceedings in his own name, to enforce it, if the executor or trustee still refuses to account to him, or fails to execute the trust.

But we hold that a freedman has no right of action in our Courts, to recover damages for injuries done to his person

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while he was a slave, or for wages on account of labor done by him as a slave. As the law then stood, his labor belonged to his owner, and the owner alone had a right of action to recover damages for injuries to his person. By his transition from slavery to freedom, no such right of the owner has been transferred to him. I may add, that, under our last statute of limitations, all such actions for personal injuries, not already commenced, are forever barred and foreclosed.

Judgment affirmed.

ELLEN D. DICKEN, plaintiff in error, vs. H. T. DICKEN, defendant in error.

1. On the hearing of a motion for temporary alimony, pending an action for divorce, the merits of the cause are not in issue. But, under section 1735 of the Code, the Judge, fixing the amount of alimony, *may* inquire into the cause and circumstances of the separation, rendering the alimony necessary, and, in his discretion, may refuse it altogether; or he may grant such alimony, including the expenses of the litigation, as the condition of the husband, and the *facts* of the case may justify. But the Judge should exercise a sound discretion, and should be careful that he does not so use this discretionary power, as to encourage the separation of husbands and wives, and increase litigation of this character.
2. After looking into the cause and circumstances of this separation, we are satisfied the Judge did not abuse the discretion vested in him by the statute.

Divorce. Alimony. Decided by Judge GREEN. Spalding Superior Court. February Term, 1869.

Mrs. Dicken sued her said husband for divorce upon the ground of cruel treatment. The charge was, that on the 27th of August, 1868, he "laid violent hands upon" her and "cruelly treated and violently used her without any cause whatever;" that on said day, and other days, he "did resort to all kinds of means and devices to harass, alarm and punish" her "using, at various times, violent threats, and pre-

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tending, at other times, to be deranged, and would act, in her presence and about the house, as a lunatic, for the purpose of alarming her." The schedule of his property made by her footed up \$5,425 00, besides \$1,500 of notes, which she supposed he owned.

He was called on to show cause why temporary alimony and attorney's fees should not be paid by him. At the hearing, an attorney-at-law testified that \$100 00 was a reasonable fee for prosecuting this cause, if it is defended; that, supposing defendant to be worth \$4,000 00 or \$5,000 00, he thought \$20 00 to \$25 00 per month was quite reasonable for her support, either at the homestead or boarding, perhaps less if she lived in the country; that the house where she lived was worth \$2,000 00, and would rent for \$250 00 *per annum*.

Another attorney testified that, if this cause was defended, a reasonable attorney's fee for prosecuting it would be from \$100 00 to \$200 00, considering defendant's pecuniary ability as shown by his return. The clerk testified, that when the libel was filed, Mrs. Dicken's attorneys told him not to issue process at once, but to let it alone for a week or two, with a view of having the cause settled, if possible, without suit.

Here movants closed.

Defendant was then examined in his own behalf. He testified that he married plaintiff in 1838, and that they had lived together peaceably till last summer; that he had been well off, pecuniarily, but lost thirty-five slaves and other property by the war; that during the war he moved to a farm four miles from Griffin; his wife insisted on returning, and he moved back to Griffin, still carrying on the farm; that after the war, he had the farm dwelling plastered and repaired, and moved back; his old slaves consented to stay with him; that he had four cooks, but neither would cook, because his wife was so cross, etc; she insisted that he should sell and return to Griffin, and he did so at a great sacrifice; he sold his farm and stock, etc., for \$4,700 00, putting his land at \$2 00 per acre, when in fact it was worth greatly more, and would now sell for \$10 00 per acre; they boarded,

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and his wife fell out with her landlady ; he then bought a house at a high price ; he went into the livery business, made money, but was dissatisfied ; after a year he sold his livery interests, bought cotton and lost \$1,600 00 ; this embarrassed him and he wished to return to the country ; he bought a place in Pike county, but his wife would not go there ; he moved there, staid about a week, was dissatisfied, sold out and wished to buy an improved place of Goddard, in Butts county, near a church which he had been serving (as a minister) for nearly eleven years ; his wife refused to go ; no place in the country would suit her ; it cost about \$1,500 00 *per annum* to live in Griffin, and he had no income ; they separated ; he bought the Locust Grove property, but his wife would not go and live with him ; he went away from it, and sent her word to go and live there and he would not disturb her, but she would not go.

He was asked if he had ever treated her cruelly. This was objected to, because cruel treatment was the ground of divorce alleged in the libel. The Court overruled the objection. He said he had not, but that on the contrary, after the separation he went to Griffin, found where she boarded and went there, intending to beg her, on his knees, to return to him, but she would not see him. He wrote a letter to her begging her to return, but she refused. He said he had been sick, and nearly lost his mind, that he was unwilling now for her to live with him unless she would respect him as the head of the family, as she had done ; that no effort was made to get him to support her before the suit was brought ; she lived in his house in Griffin, and he supposed was getting the rent of another house in Griffin, worth, say \$12 00 per month ; (this estimate was afterwards supported by another witness ;) that he had sent her \$10 00, and left some provisions and about seventy-five loads of wood for her at home when he left.

A schedule of his property was attached to his answer to the rule. It was as follows: 100 acres land in Henry county, Georgia, \$600 00 ; 2 mules and a wagon, \$400 00 ; 2 cows, \$50 00 ; merchandize in store, \$1,500 00 ; furniture, \$60 00 ; town lot in Griffin, \$1,575 00 ; town lot in Griffin,

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\$300 00; household furniture, in Griffin, \$200 00; 2 notes on Harris, due 25th of December, 1869, \$760 00, total; note on Scott, value unknown, \$800 00; note on Walker, supposed value, \$130 00; account on Thurman, \$36 00; buggy and harness, \$125 00. Of this property, his wife had possession and control of the lots in Griffin and the household furniture. He showed by schedule also, that he owed \$1,959 00.

DR. WOOLSEY testified, that defendant moved to Locust Grove on the 10th of September, 1868, bought some land, and for a time, boarded with him; that defendant was unwell, and for several days quite sick; that he visited him during his illness last summer and found him in a low state of health, and, as the witness thought, partially insane; that he did not examine him professionally, but from observing him, thought him insane or partially so. Defendant went away, stayed ten or twelve days, returned and began merchandizing. Soon he began living at the store, having rations cooked for him and his clerk at the store. Last fall his store and goods were burnt, and he thereby lost, say \$2,000 00. He is still merchandizing, but not making more than will support him and his clerk, and he owes \$500 00 for the Locust Grove property. He said the house at Locust Grove is a good one for a respectable family, and the community is a respectable one. He testified that he was boarding a school-mistress and a workman, furnishing lights, washing, etc., at \$12 00 per month, and he supposed that \$5 00 per month was enough for a lady's wardrobe.

DR. SAUNDERS, their family physician, bore testimony that they had lived well and happily together, each performing the marital duties; that she appeared to have control, that Dicken generally did as she said. Her suggestions alluded to by him, were as to the management of the sick. A witness testified that he visited Dicken when he was very sick, that his wife did not speak very affectionately to him, that he called her by affectionate names, but she would not come to him; though she was in another room and possibly did not hear him.

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s. Dicken was examined. So much of her testimony as important was as follows: Dicken coming home, in the part of last summer, complained of the extravagant and spoke of buying an unimproved place in Butts county, Georgia, and wished her to go there and live; she protested, saying, that with their limited means and his advanced age and feeble health, such a step would be imprudent.

He then insisted upon her discharging the servants doing the cooking in person; she replied she would not do the cooking for him to save his life. (She said his conduct and talk provoked her to this improper remark.) He continued talking and became excited; she went into the back yard and then into the front yard; he ordered her back into the house; she would not go, and he said, with an oath, she would; he started toward her in a violent manner; she ran out of the gate on to the sidewalk, when he seized her by the hands, crossed them, and dragged and forced her into the yard, thence into the piazza, thence into her room, shoved her into a chair, took hold of her shoulder, and, with an oath, told her to behave herself; some ladies came in and he told them that his wife had been living out of the church; she replied that she was backslidden and excited about it; then he replied that he knew that was not the cause of her leaving, and he replied that that was a lie, or an infernal lie. Once before that, he raised a saucer at the table and was about throwing it at her, when she told him he had better desist and he desisted; when he returned from Butts county and found her in bed sick, asked her who was her physician, she told him; he sat awhile and then remarked that he had better be in hell as there. She said that, for eight or ten years before their separation, his conduct was terrifying, she was afraid to live with him. She said she wished to come back from Butts county to Griffin because the house was bad, the neighbors were few, and her husband, having charge of four churches, was much from home. She was told after the house had been repaired, and did not insist on moving, but her husband sold out because his old servants would not stay with him; he spoke of having struck at a

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negro with a trace chain, and said had he hit him, he might have killed him, and that he would farm no longer. When asked to go to the Pike place, she said she thought she deserved a better house; he insisting upon her going, she said her daughter's situation would not allow her to go, and he appeared satisfied; he stayed but about a week in Pike, and then sold that place; that was before his health and mind appeared to be impaired; about two months after he had attempted to kill himself, the difficulty occurred which caused the separation; she thought him then in his right mind; she did not think him insane last summer, though some of his friends did; he took a good deal of laudanum and whiskey; she always treated him kindly, and would not have left him had it been possible to live with him; she said she inherited four or five slaves and some money, which went into their common stock, and she had assisted in accumulating what they had; she thought she needed \$30 00 per month to live; said she had had no money but \$12 00, collected for rent, \$18 00 for wood sold, and \$10 00 sent to her by him; her son-in-law, by Dicken's consent, was living with her in Dicken's house; she was told that he would let her live with him if she would treat every one who came, and negroes, kindly, and she understood this to mean that she should receive negroes as equals; she said her health was not good; that she had no income except from her labor, and sometimes needed a physician. She said further, that she would not now live with him, because she was satisfied he wished to be rid of her.

One of her attorneys testified that, after the libel was filed, but before he was served, Dicken was asked to make provisions for his wife's support, and he refused.

The testimony being closed, and argument had, the Judge ordered Dicken to pay his wife's attorneys \$50 00, as a fee, and that she be allowed to remain in his said house pending this action. Her attorneys say the allowance, for a fee, was too small, and the refusal of other alimony than the occupancy of the house, was wrong, and that the Court also erred in hearing Dicken's testimony as to cruel treatment of his wife.

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BOYNTON & DISMUKE, for plaintiff in error.

D. J. BAILEY, for defendant in error.

BROWN, C. J.

It is not the purpose of this Court to enter into a discussion of the merits of the unfortunate difficulties which have resulted in the separation of the parties to this record. Doubtless the heavy losses which they sustained by the war, had much to do in producing the state of mental disquietude and irritability which led to the separation. From the possession of what, in the section of country where they lived, might be termed wealth, they were reduced in their estate, till they must labor in their old age for a living, much less comfortable than they formerly enjoyed without the necessity of daily toil. Struggling with these misfortunes, Mr. Dicken found his wife unwilling to accommodate herself to their changed condition and to live in the country, in the simple style which he felt obliged to adopt. This, with his losses resulting from unfortunate trading since the war, had affected his mind very seriously; and it would seem, from the testimony of the witness, and the irregularities of his conduct, so much in conflict with his Christian character, that it must, at times, have produced temporary insanity. In this unfortunate condition of the family, the record does not show that the wife conducted herself with that gentle forbearance, or that she displayed that sympathy and kindness so characteristic of her sex, in times of misfortune and distress. Had her course been different towards her husband in his periods of gloomy depression, the necessity for this proceeding might probably never have existed.

1. But it is insisted by the learned counsel for Mrs. Dicken, that the Court had no right to inquire into the causes of the separation, in a motion for temporary alimony—that the proof of the marriage and the pendency of the action for divorce entitled her to it, as matter of right. We admit that some of the former decisions of this Court, go far to sustain this

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view of the case. But we think the rule, if it had been so established by the Court, has been changed by the Code, and that the change was a proper one. The legislature has certainly gone quite as far as sound public policy authorizes, (it might not be proper for the Court to say, further than the New Testament justifies,) in the enactment of laws facilitating the separation of husband and wife by divorce. If the Courts encourage those separations, by a liberal grant of temporary alimony, when the wife, as plaintiff, is decidedly at fault, the evil will be greatly increased.

It follows, therefore, in our opinion, that the legislature acted wisely in giving the Judge the power, in his discretion, to inquire into the cause and circumstances of the separation, in fixing the amount of alimony, and in authorizing him, in proper cases, to refuse it altogether. When the wife has, in fact, been wronged, and she comes into Court with a just cause of action, every facility should be afforded her, to litigate upon terms of perfect equality with her husband, and the Judge should so shape his orders as to give her the means to do so, with a comfortable support, according to her *status* in society, and her husband's ability, pending the litigation. But the Judge should not be bound to give alimony to encourage such litigation, in every case where an imprudent, high-tempered, or even criminal wife chooses to commence proceedings of this character against her husband: He is not bound to inquire into the cause and circumstances of the separation. The statute says he *may* do it. And as he is to exercise a sound discretion in determining on the amount of alimony to which the wife is entitled, or whether she is entitled to any, there seems to be good reason why he should make the inquiry in a large proportion of the cases of this character, which come before him.

But it was insisted that the Judge allowed a less sum for counsel fees, in this case, than was proven to be the *minimum* fee, for the prosecution of such a case, and that his judgment was, therefore, contrary to the evidence and should be set aside. If the Judge had the right, after the hearing of the case, to refuse anything for alimony or counsel fees, we do not

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see why he had not the right to allow a less amount than the proof shows the services of the counsel to be worth.

2. The whole question is one of sound discretion. Under all the facts and circumstances of this case, did the Judge abuse the discretion vested in him by the statute, to such an extent as to make it the duty of this Court to interfere, and set aside the judgment. We think not.

It is claimed that there is some ambiguity in the order which leaves it doubtful, whether Mrs. Dicken is to have the use and control of the house in Griffin, where she lives, which one of her witnesses testifies, will rent for \$250 00 *per annum*, as her alimony, or whether she has only the right to occupy a room in the house. We construe the judgment to mean that she is to have the use and control of the house, with the right to receive the rents during the litigation, and we have so shaped our judgment as to make that certain, if it were not so already.

Judgment affirmed.

APPENDIX.

3181 of Irwin's Revised Code is in these words :
Several Judges of the Superior Courts of this State
meet at the seat of government once in each year, at
which time as they, or a majority of them, may appoint, for
the purpose of establishing uniform rules of practice through-
out the several Circuits of this State ; which rules, so estab-
lished, shall be published immediately after the adjournment
of the Convention."

Section 192 of said Code is as follows :
The rules of the respective Courts, legally adopted,
in case of conflict with the Constitution of the United
States, or the laws thereof, are binding, and
shall be observed."

A Convention was held at Atlanta, Georgia, on the
15th of July, 1869, and established the following :

RULES OF THE SUPERIOR COURTS.

COMMON LAW RULES.

APPEALS.

Options to the security on appeal must be taken on
the last day of the first term of the appeal ; and if
options are sustained, other and good security shall
be given or the appeal will be dismissed. If the security,
first given, becomes insolvent pending the appeal, the party
shall give other good security, in the discretion of
the Court, or the appeal shall be dismissed. In either case,
the appeal may be filed in *forma pauperis*.

ATTORNEYS.

2. The following shall be the form of the license, issued by the Clerks of the Superior Courts, to attorneys admitted to the Bar :

STATE OF GEORGIA :

At the Superior Court, holden in and for the county of, at Term, 18....

KNOW ALL MEN BY THESE PRESENTS, That at the present sitting of this Court, A. B. made his application for leave to plead and practice in the several Courts of Law and Equity in this State: Whereupon, the said A. B., having given satisfactory evidence of good moral character, and having been examined in open Court, and being found well acquainted and skilled in the laws, he was admitted by the Court to all the privileges of an Attorney, Solicitor and Counsellor in the several Courts of Law and Equity in this State.

In testimony whereof, the presiding Judge has hereto [L. S.] set his hand, with the seal of the Court annexed, this day of, in the year 18....

C. D.,

Judge Superior Courts, Circuit, Ga.

E. F., *Clerk.*

3. Arguments of counsel shall be confined to the law and the facts involved in the case then before the Court; and in all civil cases, questions of law shall be argued exclusively to the Court, and questions of fact to the jury.

4. No attorney shall be permitted to interrupt another while addressing the Court or jury, except to correct him in a misstatement of evidence, or misrepresentation of the position of counsel, upon pain of being considered in contempt; and such interruption, when made, shall always be addressed to the Court, and not the counsel.

5. All requests to charge the jury shall be made in writing, and handed to the Judge before he commences his charge.

6. After the trial of a case, it shall be the duty of attorneys to return all of the papers connected therewith to the Clerk.

7. Not more than two counsel shall be permitted to argue any cause for each party, except by express leave of the court; and in no case shall more than one counsel be heard in conclusion.

8. No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been fully pronounced, on pain of being considered in contempt.

9. In all cases where payment or satisfaction shall be made on any judgment or execution, either in whole or in part, it shall be the duty of the attorney receiving the same forthwith to enter an acknowledgment thereof, and file the same of record in the office of the Clerk of the Court where such judgment was rendered; and such Clerk is required to record such acknowledgment among the other proceedings in the cause, and also to make a note thereof on the docket of judgments opposite the place where such judgment is entered. Any attorney failing to comply with this rule, on or before the last day of the term next succeeding the making of such payment or satisfaction, shall be considered in contempt, and shall pay a fine not exceeding *twenty-five dollars*, which it shall be the duty of the Court to impose, and he shall thereon moreover direct the recording and noting of such payment or satisfaction.

10. Writs and other proceedings may be signed by professional firms. When there is no firm, the Christian name of the attorney shall be added; but the usual abbreviations and initials of all Christian names shall be sufficient.

11. No attorney, or other officer of the Court, shall be taken as *bail* in any criminal cause depending on or undetermined therein, or as security on any appeal or other proceedings. And for a violation of this rule, the attorney, or officer of the Court so offending, shall be punished as for a contempt, and the party shall be compelled to give other bail or security.

BILL OF PARTICULARS.

12. In actions of *assumpsit* for the recovery of unliquidated demands, a bill of particulars shall be annexed to the

copy served on the defendant; and in every case where the plea of set-off shall be filed, a copy of the set-off shall be filed at the time of filing the answer; and when the bill of particulars is not annexed to the declaration, the plaintiff shall lose a term; and if service of said bill of particulars is not effected upon the defendant by the succeeding term, a non-suit shall be awarded.

CLAIMS.

13. In all cases of claims, where the burthen of proof rests with the plaintiff in execution, he is entitled to the conclusion; but if the claimant introduces no evidence, he shall have the conclusion; and in cases of illegality, the plaintiff in execution shall, in like manner, conclude.

14. In cases of claims, when the claimant dies pending the claim, his representative may be made a party, on motion, and on producing letters testamentary or of administration.

15. When a claim case is called in its order for trial, an issue must be tendered within five minutes, or the levy will be dismissed; and no exceptions will be allowed to the bond or affidavit, in cases of claims or attachments, after issue joined, except such as are taken, in writing, at or before the joining such issue.

CLERKS.

16. Every Clerk, who cannot produce all the Rules of Court when required, shall be fined not exceeding *ten dollars*.

17. The Clerks shall keep a separate book, in which they shall register the names of all persons who may be fined by the Court, the time when, the offence for which they are fined, the amount received and disbursed.

18. No Clerk shall suffer any original paper of file to be taken from his office in vacation, without an order from the Judge for that purpose, specifying the terms upon which it may be taken, and the length of time it may be kept, on pain of being considered in contempt of Court.

19. When a case is called in its order for trial, the Clerk

shall, *instantly*, hand all the papers connected therewith, to counsel.

CONSENT.

20. No consent between attorneys or parties will be enforced by the Court, unless it be in writing, and signed by the parties to the consent.

21. No consent to dispense with pleading, will, in any case, be allowed; nor will any evidence be received of the contents of any written agreement between attorneys, alleged to be lost, other than a sworn copy of said agreement.

CONTINUANCES.

22. When a case is sounded for trial, the parties shall immediately announce ready, or move to continue; if five minutes should elapse before the announcement or motion to continue, the plaintiff's case will be dismissed; or the defendant's plea stricken.

DEFAULT.

23. Upon opening a judgment by default, the defendant shall plead, *instantly*, to the merits of the action; and no default shall be opened, but upon payment of all costs which may have accrued. If the plaintiff allege himself to be surprised by the plea, the cause shall be continued at the instance of the defendant.

DEFENSE.

24. The following form of affidavit to defenses in actions founded on contracts, shall be used: You, A. B., do swear or affirm (as the case may be) that the foregoing defense is true, to the best of your knowledge and belief. So help you God." All amendments must, in like manner, be verified.

25. No party shall be permitted to defend an ejectment cause who does not admit that he was in possession of the premises in dispute at the commencement of the action.

DOCKETS.

26. After the Court is opened, and until it adjourns each day, the Judge's dockets shall not be subject to the inspection of the bar or their clients.

27. All causes shall be called and tried in the order in which they are docketed, without any preference or delay, unless it shall appear to the Court that it shall be injurious to press a cause to trial when regularly called. A different order in calling the docket may be pursued by the Court, in its discretion, for the purpose of giving facility and expedition to its proceedings, or for furthering the ends of justice.

EXCEPTIONS.

28. All matters appearing to the face of the declaration or process, that would not be good in arrest of judgment, shall be taken advantage of at the first term, and will be immediately determined on by the Court; unless where the Court may entertain a doubt as to the law on the point; if so, the cause will be suspended, giving the defendant leave to plead his exceptions specially, together with any other matter which he intends to rely on in his defense. The exceptions thus pleaded shall be argued at a subsequent term; and if not sustained, the plaintiff shall have his election to try *then* or to continue without a showing.

EXECUTORS AND ADMINISTRATORS.

29. An executor or administrator shall not be permitted, in answer, to deny any deed, bond, bill, note, or other written instrument of his testator or intestate, being the foundation of the plaintiff's action, without an oath or affirmation endorsed on such plea or answer, that he has reason to believe, and does verily believe, that such plea or answer is true.

ILLEGALITY.

30. When an affidavit of illegality is made, an account of partial payment made on the execution, the defendant, at the time of making such affidavit, must pay up the amount he

admits to be due, or the Sheriff shall proceed to raise that amount and accept the affidavit for the balance.

31. No second affidavit of illegality shall be received by any Sheriff or other officer.

INTERROGATORIES.

32. The following shall be the form of a commission to take testimony by interrogatories:

GEORGIA, } By his Honor, one of the Judges
of the Court, for the County and
..... County, } State aforesaid:

To, *Esquires, greeting:*

WHEREAS, There is a certain matter of controversy now depending in the Court for said county, between; and WHEREAS, is a material witness in said suit, and cannot attend our said Court in person, without manifest inconvenience:

Now, know ye, that we, reposing special trust and confidence in your prudence and fidelity, have appointed you; and you, or any two or more of you, are hereby authorized and required to cause the said personally to come before you, and after being duly sworn, to examine concerning the said suit, agreeably to the interrogatories hereunto annexed; and the answers to the same being plainly and distinctly written, you are to send the same, closed up under your hands and seals, to our said Court, to be held on the day in next, together with this writ.

Witness, the honorable, one of the Judges of said Court, this day of

33. The names of the witnesses intended to be examined by commission shall be distinctly specified in the notice served upon the adverse party, preparatory to issuing the commission.

34. The time to be allowed for the return of commissions from any part of the United States of North America, if less than one hundred miles distant from the place of trial,

shall be twenty days ; if at a greater distance, and less than five hundred miles, forty days ; if at a greater distance, sixty days ; to any part of the West Indies or South America, eighty days ; or to any part of Europe, one hundred and twenty days, unless, in the discretion of the Court, a longer time shall be allowed.

35. In cases of commissions returned not executed or directed according to rule, either party in the cause shall, upon five days' notice to the adverse party, or his attorney, be permitted to return the commission and its contents, (excepting the answers of the witness, which shall remain in the Clerk's office,) to the commissioners, to be properly executed and directed.

36. When commissions are returned by mail, to entitle the party to open the same, the postmaster, his deputy or assistant, must endorse upon the back : "I certify that I received this package from A. B., one of the commissioners." The usual abbreviations of initials of christian names of the commissioners, witnesses, attorneys, clerks, magistrates, and postmasters, shall be sufficient.

37. No exception to a written interrogatory, on the ground that it is a leading question, shall prevail, unless it be filed with the interrogatories before the issuing the commission.

JUDGMENT.

38. The following form of judgment shall be used in all civil cases founded on contract, where an issuable defense is not filed on oath :

A. B. }
 vs. }
 C. D. }

There being no issuable defense filed on oath in this case, judgment is rendered by the Court for the plaintiff vs. defendant for dollars and cents, as principal, dollars and cents as interest, and dollars cents for costs of suit.

This day of, 18—.

E. D., Judge S. C., Circuit.

39. In all suits upon promissory notes and other obligations in writing, and in all suits upon accounts where there has been personal service, and an issuable defense is not filed under oath, the Court shall render judgment for the plaintiff; and in all suits upon open accounts, where there has not been personal service, and in which there is no issuable defense filed under oath, the plaintiff shall be required to establish his claim *prima facie*.

JUSTICES OF THE PEACE.

40. The Justices of the Peace, and other committing magistrates, shall return all examinations and recognizances by them taken, or other papers that may be necessary to be acted upon by the Superior Courts of their respective counties, on or before the first day of the term of each Court, except in the counties of *Richmond* and *Chatham*, where they shall make said return ten days before said Courts, if taken that length of time before the sitting of the Court.

JURIES.

41. In striking juries, not more than one minute shall be allowed either party for each strike.

LOST PAPERS.

42. Whenever a party wishes to introduce the copy of a deed or other instrument, between the parties litigant, in evidence, the oath of the party stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be a sufficient foundation for the introduction of such secondary evidence.

43. Whenever a party wishes to introduce the copy of a document in evidence, the oath of the party, stating that the original is not in his power or possession, and that he knows where it is, shall be sufficient foundation for the introduction of such copy.

MOTIONS.

44. All grounds of motion for non-suit in arrest of judgment, for continuance, all objections to testimony, and all exceptions to declarations, must be urged and insisted upon at once. And after a decision upon one or more grounds, no others afterwards urged will be heard by the Court.

45. On all rules to show cause, and other motions, the party moving shall open and conclude; and on all special matters springing out of a cause at issue, the actor or party submitting a point to the Court shall, in like manner, begin and close.

46. Every motion for any rule or order shall be submitted to the Court, in writing, by the counsel who makes it, and if granted by the Court, shall be delivered to the Clerk.

NOTICE.

47. It shall be deemed a sufficient compliance with the notice, given under section 3458 of the Code, (whether served heretofore or hereafter,) if the party notified being a resident of any other county of the State, or temporarily absent from the county of his residence, than that wherein the case is pending, shall make an affidavit, in writing, before some judicial officer of the State, that the books or papers required and not produced are not, nor have been, in his possession, power or control, since the service of such notice. When the party notified resides in the county, he may make the affidavit in open Court, and it shall be held a sufficient compliance with the notice.

48. All notices required to be given to any officer of the Court, must be in writing.

NEW TRIALS.

49. In every application for a new trial, a brief of the testimony in the cause shall be filed by the party applying for such new trial, under the revision and approval of the Court. If, pending the motion, the presiding Judge shall die, or a vacancy otherwise occur, then his successor shall

ar and determine the motion from the best evidence at his command.

PROCHEIN AMI.

50. No *prochein ami* shall be permitted to institute any personal action, in the name and behalf of an infant, until such *prochein ami* shall have entered into sufficient bond to the Governor of the State, for the use of the infant and his representatives, conditioned well and faithfully to account of and concerning his said trust, which bond may be sued by order of the Court, in the name of the Governor, and for the use of such infant; and such bond shall be filed in the office of the Clerk of the Court in which the suit may be commenced.

RECOGNIZANCES.

51. All recognizances taken by the Clerk for the appearance of either parties or witnesses shall be written in a book for that purpose, separate and distinct from the minutes, to which he shall affix an alphabetical index.

SHERIFFS.

52. When a criminal or civil process shall have been delivered to the Sheriff, or his deputy, if no levy or service has been made in conformity with the exigency thereof, he shall state specially in his return the cause why such levy or service has not been made. If property which hath been levied remain unsold, it shall be his duty to state the cause of so remaining unsold, and to give a particular description of the same.

53. The Sheriff shall make a return to the Clerk of the Court at the opening thereof, of the names of the Coroners and Constables of the county, four of which Constables the Sheriff shall notify to attend each term, until the whole shall have served in turn; and the Sheriff shall be bound always to have at least four staves for the Constables.

54. The Sheriff of each county shall keep a Bench-Warrant Docket, on which he shall enter all bench-warrants

delivered to him, and the time when executed, if executed; and if not, the time when they may be delivered to him, and if not, the reason why they were not executed.

SURVEYS.

55. County surveyors are required to deliver copies of resurveys by them made, to each of the parties concerned upon their application, and at their own proper costs, within ten days after such application is made; and the surveyor executing a survey shall be bound to attend Court to justify the same; and shall be allowed the *per diem* pay of a witness attending upon subpoena.

56. Surveys of lands in any quantity of two hundred acres, or less, shall be laid down by a scale of ten feet to the inch; and over that quantity, by a scale of twenty chains to an inch.

57. No survey shall be received in evidence, unless it appears that at least ten days notice of the time of commencing such survey was given to the opposite party by the party who offers it in evidence. Either party to an action may have a survey made, without an order of Court, upon giving the required notice.

58. Every surveyor shall represent on his plat, as near as he can, the different enclosures of the parties, and the extent or boundaries within which each party may have exercised acts of ownership.

59. After a cause has gone to a jury and evidence has been heard in it, neither party shall be allowed to make objection to the survey executed, provided the proper notice shall have been given.

WITNESSES.

60. Witnesses shall first be examined by the party producing them, then cross-examined by the adverse party; and further examination shall not be had but by leave of Court first obtained, and then only upon the declaration of the attorney or witness, that a material fact has not been stated, to which all further inquiries shall be directed;

in all cases in which more than one attorney is retained on either side, the examination and cross-examination shall be conducted by one of the counsel only; and at the opening of the case both parties shall state to the Court to which attorney the examination and cross-examination of witnesses is confined.

RULES IN EQUITY.

1. When either party in a suit at law shall be desirous of obtaining the interposition of the Court, in the exercise of its equitable jurisdiction in the prosecution or defense of said suit, the application therefor shall be by bill, which may be sanctioned by the Judge upon such terms as shall seem just and reasonable. And no bill to enjoin an action at law shall be sanctioned by the Judge, unless the same shall be presented in time to be made returnable to the regular trial term of the case next after the sanction of the bill, unless good cause to the contrary, to be judged of by the Chancellor, shall be shown in the application for the bill, and be sworn to by the party.

2. The oath or affirmation of a defendant to his or her answer shall be: "You, A. B., do swear, (or affirm, as the case may be,) that what is contained in your answer, as far as concerns your own act and deed, is true of your own knowledge, and that what relates to the act or deed of any other persons, you believe to be true."

3. After appearance by the party defendant to any bill in equity, by any solicitor of this Court, the service of any subpoena to make better answer, or any rule or order of the Court on such defendant or solicitor, shall be sufficient. Service upon complainant, or his solicitor, shall, in like manner, be deemed sufficient service.

4. Copies of all exhibits shall be filed with the bill or answer, and no exhibits shall be admitted, unless by order of the Court, for some special or good cause shown. The

production of the original, if not admitted by the answer, may be required on the hearing; and upon application to the Court, or to the Judge in vacation, and cause shown, the original of any exhibit will be ordered to be deposited in the Clerk's office, for the inspection of the adverse party.

5. When auditors have made up their report, the same shall be returnable in the Clerk's office without delay, and shall remain open to the inspection of both parties.

6. The rule at common law, which requires a *prochein ami* of an infant to give bond to account, etc., shall also be observed in equity.

Paragraph 5th of section 205 of Irwin's Revised Code gives power to the Supreme Court "to establish, amend and alter its own rules of practice, and to regulate the admission of attorneys."

Section 192 of said Code declares that "the rules of the respective courts legally adopted, and not in conflict with the Constitution of the United States, or of this State, or the laws thereof, are binding, and must be observed."

Under and by virtue of said authority, said Court, at Atlanta, during the June Term, 1869, established the following:

RULES OF THE SUPREME COURT.

ATTORNEYS.

1. All attorneys who have been admitted to practice in the Superior Courts of this State, may be admitted to practice in the Supreme Court, on application; provided, they exhibit to the Court satisfactory proof of good private and professional character, and pay to the Clerk of the Supreme Court the usual fee of five dollars, who shall issue to each applicant a license, under the seal of the Court, upon each applicant taking and subscribing the following oath: "*I do solemnly swear, (or affirm, as the case may be,) that I will demean myself, as attorney or counsellor of this Court, uprightly and according to law; and that I will support the Constitution of the State of Georgia and the Constitution of the United States, to help me God.*"

2. The written recommendation of any one or more respectable members of the bar, certifying to the good private and professional character of an applicant for admission, shall be sufficient evidence of character, and will in all cases be required.

3. Any attorney from other States or Territories shall, on taking the usual oath, be admitted to plead and practice in this Court, who produces satisfactory proof that he has been regularly licensed in the highest judicial tribunal of such State or Territory, and is, at the date of his application, a practicing attorney of the same.

4. No agreement or admission between the parties, or their attorneys, shall be binding, unless the evidence thereof shall be in writing, subscribed by the party, or his attorney, against whom the same shall be alleged.

5. The counsel of neither party shall, without special leave of the Court, (obtained before the argument is opened,) occupy more than two hours in the whole discussion of the cause. But the time consumed in reading the record, without comment, shall not be computed against counsel for plaintiff in error.

6. Only two counsel shall be permitted to argue for each party, plaintiff and defendant, in a cause; and the counsel for the plaintiff in error shall begin and conclude, reading all the authorities upon which he expects to rely in his opening argument; and in all special matters springing out of a cause at issue, or otherwise, the actor or party submitting a point to the Court shall begin and conclude.

7. No attorney, while arguing a case before the Court, shall make any personal remarks discourteous to, or in disparagement of, opposing counsel, or of the Judge, whose decision is the subject of review. Counsel in the argument of their cases are entitled to all the latitude which is necessary to a full and fair discussion of the points made by the record, and the legal or constitutional questions involved, but they shall not indulge in denunciation of any branch of any government, under which we live, or in remarks calling in question the honesty or integrity of any co-ordinate department of the government; and no such remarks will, at any time, be tolerated by the Court, unless the official whose motives are impugned is on trial, or in some way a party to the record, and his official conduct is the proper subject of investigation and adjudication.

BILLS OF EXCEPTIONS.

8. In all cases brought before this Court, the bill of exceptions must distinctly specify the points of error in the judgment of the Court below, upon which the plaintiff in error expects to rely on the hearing.

9. No cause shall be heard until the bill of exceptions and complete record containing, with the bill of exceptions, without references *aliunde*, all the papers, exhibits, depositions and other proceedings which are necessary to a hearing in this Court shall have been filed; and all objections to the completeness of the record shall be made in writing and verified as provided by the Code, on or before the calling of the case on the docket for a hearing; and in all cases where such exceptions are filed and allowed by the Court, the cause shall be considered as returned to the next succeeding term, and the Court shall, on motion, award a writ of *certiorari*, directed to the Court below, for the purpose of causing to be put up the entire record, which writ shall be served by the party, or his attorney, moving the same, and shall be returned the next term after it is awarded; *provided*, that nothing herein contained shall prevent this Court from awarding a process for contempt against any officer, in any case, where he may be considered as in default.

10. A brief of the oral and a copy of the written testimony in the case shall be incorporated in the bill of exceptions, or be attached thereto, as an exhibit, when presented to the Judge for his certificate—in which latter case, it shall be identified, as true, by the signature of the Judge thereon.

11. Every Clerk of the Superior Court with whom a bill of exceptions may be filed, shall transmit the same, with a complete transcript of the record in the case, to the Clerk of this Court, at the seat of government, by mail or express, on or before the day succeeding the last day allowed him by law to make the transcript. In no case shall the Clerk of the Superior Court deliver the original bill of exceptions and transcript of the record to either party, or to counsel of either party; but he shall send the same to the Clerk of this

Court, as herein directed; and in every case he shall take a receipt from the postmaster or express agent, and transmit a copy thereof to the Clerk of this Court; and counsel for plaintiffs in error shall be bound to the Clerks of the Superior Courts, for the cost of transmitting papers, as herein directed.

BRIEFS.

12. On or before the calling of the cause, on the docket, for a hearing, the counsel for the plaintiff in error shall furnish to each of the Judges, and to the Reporter, a printed or plainly written copy of the bill of exceptions, a brief of the points intended to be made in the argument, with the authorities relied on, and, if the facts of the case do not appear in the bill of exceptions, a brief abstract of them, as they exist in the record.

13. The counsel for the defendant in error, before commencing his argument, shall hand to each of the Judges and the Reporter a statement of the points he intends to submit, and a list of the authorities upon which he relies.

14. No argument or brief of counsel shall be received by the Reporter after the decision of the Court has been delivered.

15. When a brief is filed by counsel for either party, and no other appearance is made for that party, the Clerk, if required, will read it in open Court.

COSTS.

16. The attorney who makes out and tenders the bill of exceptions shall sign his name to the same, and shall, with the counsel representing the case before this Court, (whose name shall, in all cases, be marked on the docket,) be bound for costs.

17. Upon the reversal of any judgment, order or decree of the Superior Courts, the party in whose favor the reversal is had shall be entitled to collect in the Court below all costs which have accrued in the cause.

18. Upon the Clerk of this Court producing satisfactory

evidence, by affidavit or the acknowledgement of the parties, their sureties or attorneys, of having served a copy of the bill of costs due by them in this Court on such parties, sureties, or attorneys, an attachment may issue against such parties, sureties and attorneys, to compel payment of costs; and when there is no appearance for plaintiff in error, and the case is disposed of, and the cost is not paid, on motion of the Clerk, an attachment shall issue instanter against the attorney signing the bill of exceptions for the same.

DOCKET.

19. All cases returned to this Court shall be entered on the bench docket and numbered, on or before the Court meets on the first day of the term to which they are respectively returned, and the cases first received by the Clerk shall be first entered.

20. The Clerk shall furnish a transcript of the bench docket for the use of the bar; and the bench docket shall not be subject to inspection during the sessions of the Court.

21. All cases entered on the bench docket shall be called and tried in the order in which they are there entered. It shall, however, be competent for the Court, upon special cause shown, to set down a case for hearing out of its regular order.

22. When cases are called for a hearing, and there is no appearance by the plaintiff in error, the defendant may have the plaintiff called, and move the Court to dismiss the writ; or he may open the record and pray for an affirmance of the judgment; and in case the writ is dismissed, or the judgment affirmed, the plaintiff in error shall pay the cost; and should the defendant fail to appear, then the plaintiff shall be entitled to have him called, and open the record and pray for a reversal of the judgment.

MOTIONS.

23. Every motion for any rule, order or judgment, shall be submitted to the Court, in writing, by the counsel who makes it, and if granted, shall be handed to the Clerk.

OFFICE PAPERS.

24. No paper belonging to the Clerk's office shall be taken therefrom without leave of the Court, and when such leave is granted, the party receiving papers shall receipt to the Clerk for the same.

25. All opinions delivered by the Judges of this Court shall, immediately upon the delivery thereof, be handed to the Clerk, whose duty it shall be to record the same, and then to deliver the originals to the Reporter, who shall return the same to the Clerk, to be filed for preservation, as soon as the volume of reports for the term at which they are delivered shall be published.

PARTIES.

26. Whenever, pending a cause in this Court, either party shall die, the proper representatives of such party may voluntarily come in and be admitted as parties to the suit, upon motion; and thereupon the cause shall be heard and determined as in other cases; and if, on or before the first term succeeding the decease of the party dying, there shall be no representation of his estate, or if represented, parties shall not be thus voluntarily made, then, and in either of said events, the other party may, at that term, suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representation be had, and parties made voluntarily, as hereinbefore authorized, on or before the case is called on the docket at the term then next succeeding, the party moving such order, if defendant, shall be entitled to have the writ of error dismissed, and if the plaintiff, he shall be entitled to open the record, and proceed to a hearing; *provided*, that a copy of every such order shall be published in one of the gazettes at the seat of government, three successive weeks, at least sixty days before the said last named term of the Court, or served on the adverse party thirty days before the first day of said term.

REMITTITUR.

27. The remittitur containing the decision of the Court, and any direction awarded in the case, shall be made out and signed by the Clerk, under the seal of the Court, with the bill of cost annexed thereto, and delivered to the party, or his attorney, in whose favor the decision shall be made, by whom it shall be transmitted to the Court below.

RULES OF COURT.

28. The Clerk of this Court shall, on pain of being in contempt, produce, on the call of the Court, a copy of the rules of this Court.

PROCEEDINGS AS TO THE DEATH OF HOWELL COBB.

ATLANTA, 11th AUGUST, 1869.

To the memory of

HOWELL COBB,

Georgia's Statesman, Jurist and Soldier.

The Committee appointed to report a suitable tribute to the memory of the late General Howell Cobb, beg leave to submit, that at a meeting of the Superior Court of Bibb county, and of the Bar in attendance, at Macon, on the 30th November last, the following preamble and resolutions were adopted, to-wit:

“General Howell Cobb being on a visit to the North, with his wife and daughter, died in the city of New York on the 9th day of October last, at the age of fifty-three years. He was seized suddenly, was prostrated in a moment of time, and expired in a few minutes thereafter. A man of vigorous constitution, and until very recently, in the enjoyment of uninterrupted health, no one had a fairer promise of long life; and surrounded with numerous and devoted friends, and blessed with the sweetest and richest endearments of home and family—of a life of unmingled happiness. He was called hence without premonition. This providence, to our limited vision, looks strange; but we well know that it is not for us to sit in judgment upon the inscrutable events of the Divine Government. We believe that the all-wise and all-merciful Ruler ordereth all things well, and, therefore, it is our duty and privilege to acquiesce without a murmur in His dispensations. “Justice and Judgment are the habitation of Thy Throne; Mercy and Truth shall go before Thy

Face." When the telegraph announced the death of our brother, thousands of people all over this broad land, and we among the number, felt that they had lost a loved and cherished personal friend. The country was stricken with awe and tremulousness. Sadness and sorrow, and deep regrets, fell upon all who knew him. We may not assume to speak of the effects of their great bereavement upon the family of the deceased. *They* have solved the mystery of unutterable grief. And yet, as we shall see, even they are not left to mourn as those who have no hope. It is a melancholy pleasure for us to honor the name and memory of General Cobb. Alas! how melancholy! Still it is a pleasure. It is indeed pleasant to be enabled to place upon the records of this Court our unanimous, cordial, unqualified testimony, to his genius and learning, his professional honor, his statesmanship, his patriotism, his kindness of heart, and his unrivalled social attractiveness. We lay this offering upon his tomb. It may be humble, but it expresses our affection and our respect for his character, as eloquently as would a monument carved in marble and emblazoned with gold.

General Cobb was a native of Georgia, born of highly respectable and pious parents, in the county of Jefferson. He was graduated at the University of Georgia, during the presidency of Dr. Church, in the class of 1834. Immediately after his graduation he commenced the study of law under the direction of General Hardin, a most excellent gentleman of that ilk, and when admitted, at an early age, settled in the town of Athens, Clarke county. Very soon he acquired a good practice, both in his own county and in the circuit. For several years, he held the office of Solicitor General of the Western Circuit, discharging the duties efficiently—zealous to convict the guilty, but forbearing towards the innocent. Neither the sovereignty of the State nor the citizen suffered wrong at his hands. A brilliant career awaited him. With a commanding person; fine voice, conciliating address, industry, thorough furniture, and ardent, self-reliant and ambitious, he would have speedily reached the highest level of professional distinction. But a change came over the spirit

of his dream, and like the most of the young men of that day who were conscious of intellectual power, he became enamored of political life, and his aspirations in that direction were so promptly realized, that his profession became an object of secondary importance.

After the fall of the Confederate Government, he settled in the city of Macon, and resumed the practice of the law. His success was equal to his most sanguine expectations; clients multiplied, and at his death he stood in the front rank of the Georgia Bar. Upon an occasion so solemn as this, it becomes us to say nothing for effect, and to indulge in no exaggeration; and we may, therefore, hope that our estimate of General Cobb, professionally and otherwise, will be taken as true and candid. He was not, in legal argument, a dealer in dull, dusty cases, with little or no application to the point at issue. He was master of the principles of our noble science, and his acute discrimination and clear, vigorous judgment enabled him to apply them successfully. Nor did he rely upon them and his native originating power alone, but was wont to arm himself with authority, that last authority which ruled the principle, and most perspicuously illustrated it. His manner of argumentation was logical, without the stiff, cold, formality of scholasticism. Indeed he was a natural logician—he knew well how to assume premises and draw conclusions, without the aid of the syllogism or the tricks of the sophist. Before the Court he had great power of condensation, and never weakened his cause by repetition or profuse elaboration. He was happy in the handling of facts before the jury, and skillful, though fair, in his statement of them—just to his adversary, earnest and persuasive, not unfrequently wielding at will both the convictions and the passions of the panel.

In this connection, it may be proper to say that his eloquence found its happiest display before large popular assemblies. He was peculiarly at home at the hustings—there he achieved his most splendid triumphs, there he became regal. His clarion voice reached the ear of a great multitude, and his honest, amiable character reached their hearts. General Cobb's political career was not only successful, but exceed-

ingly brilliant. He rose rapidly from one position to another, until he became a recognized leader of the great Democratic party of the American Union. This is not the occasion, nor ours the duty, to trace his ascending course. That responsible task will devolve upon the historian or biographer. Suffice it now to say, that before the war he represented his district in Congress for a number of years, was Speaker of the House of Representatives, Governor of Georgia, and Secretary of the Treasury during Mr. Buchanan's administration. His political record may be said to be voluminous. In it there is not to be found a blot or a blur. Amidst all the violence of party warfare no one of his political opponents, however unscrupulous, was ever known to utter a word impugning his integrity as an officer, or his honor as a gentleman. The House of Representatives of the United States is a theatre, upon whose boards demagogues play for popularity, partizans for power, genius and eloquence for renown, and patriots for peace, order and good government. It is, therefore, often disorderly, and frequently tumultuous. To preside over such a body with acceptability requires rare endowments—a thorough knowledge of men—quickness of perception—patience—self-control—firmness—a clear sense of justice—tact and impartiality. Especially is it necessary that the Speaker command the respect of the House. That is in fact the chief element of his authority. All these qualities our friend possessed in an eminent degree; and hence it was that no Speaker, since the time of Mr. Clay, discharged the duties of the chair with more marked efficiency than did he.

When the State seceded, having contributed as much to the result as any other citizen, he gave himself unconditionally to the cause of the South. He yielded to it all the honors which he had won under the Union, and consecrated to its success his name, his estate, and his life. He was elected a member of the Provisional Congress, and when it met was chosen its presiding officer. No body ever convened at the South was more able or more patriotic than this Congress. Party prepossessions, committals, animosities and creeds had no place in the deliberations of that august assem-

bly. They could not live in an atmosphere charged with the sublime responsibilities of a stupendous revolution. A constitution was passed upon the basis of the principles of 1776, which was an improvement, as many believe, upon the Federal Constitution—laws were passed and officers chosen to administer them. The civil revolution was in a few weeks accomplished, and the new government moved forward with harmonious grandeur unparalleled in the annals of empire. To these ends no member contributed more than General Cobb. His experience, profound knowledge of constitutional liberty, and sound judgment, were all made available in that great crisis. He was also a member of the permanent Confederate Congress, but when the war began to rage, with its terrific foreshadowing of slaughter, poverty and the scaffold, he retired from the halls of legislation and joined the army, rising rapidly to the grade of Major General.

In the military service he was ever prudent, obedient to rightful authority, gallant and energetic. When the Confederate Government—after sacrifices indescribable, and the display of heroism unimagined in the wildest dream of romance—fell, he conceded the fact of its extinction by overwhelming force, and acquiesced in the necessity of the surrender of its armies. Not only so, but he advised and urged the return of the Southern States to their former place in the Union. Uncomplainingly, and with quiet dignity, he retired to the walks of private life. We looked to him, in these latter-day troubles, and in the contingencies of the future, as one of our wisest, safest advisers. We did well hope that he would live to be, as he ever had been, the champion of law and liberty. But he has passed “from gloom to glory,” and his country has nothing left but the heritage of his fame and virtues.

Turn we now to contemplate him in his private character. A mere outline sketch is all that we are at liberty to appropriate to a theme to which a volume might well be devoted. Its necessary meagerness, however, does not make it otherwise than grateful. It is sometimes the case that eminent men, especially in political life, draw around them friends

from fear, or favor, or policy. Governor Cobb's friends became such from affection. It is believed that he left more personal friends than any man who has lived and died in the State. These admired him for his ability, but loved him for the kindness, generosity and nobility of his nature. These were attracted by his stern sense of justice, by his benevolence, his charity, and his genial companionship. Had he been less distinguished, he would not have been less beloved. Political antagonism engendered no bitterness in his soul; rivalry created no hatred, and disappointment did not lessen his cheerfulness. Public life did not cool the warmth of his heart, and high position did not weaken in him the obligation of social duties. Nor was he capricious in his likings, but true and staunch, through evil and through good report. The lowly and the lofty alike, if meritorious, shared in his good offices and elicited his sympathy.

In the relations of husband, parent, brother and companion, he was a model man. His intercourse with his family was governed by the law of love. As its head he ruled with prudence and authority, but it was the authority of superior wisdom, united with forbearance, tenderness, and assiduous attention. His wife and children alone know, and they only can tell, how sweet were the charities of their home.

The soldiers of his command during the war, testify to his considerate attention. The poor, the suffering and dying, were always the object of his care and kindness. It has been represented by one occupying a high place, recently, that he visited, upon a sick and dying Federal prisoner, extreme and wanton cruelty. This charge has been conclusively disproved, but if it were not, we who know him well, could not, would not, believe it. It is contradicted by the whole tenor of his life, and by the unbroken course of our experience of his character. And, standing as we do, at the brink of his recently opened grave, we take the responsibility of saying, that the conduct attributed to him was utterly impossible.

Perhaps in nothing was the goodness of his heart more beautifully manifested than in his attention to dependants.

Some of the old and faithful servants, for example, of the family. These he provided for and protected. Destitution and want always drew from him sympathy and supplies.

It remains to speak of his religious character. He never made a public profession of religion, but it is known to his intimate friends that he had made up his mind to unite with the Baptist Church, the Church of his parents, and of his wife, upon his return this fall to Macon. In the judgment of those friends he died a Christian. And this is the hope that we trust, even now, mitigates the sorrows of his mourning family and relations, and will, ere long, reconcile them to his loss. He was a praying man for fifteen years before his death, according to his own account, but was harrassed with doubts about the divinity of the Saviour—that is, as to the Godhead dwelling in the humanity of Christ. He could not solve the mystery of Godliness, God manifest in the flesh, which the Scriptures themselves pronounce great. Unable to believe without a satisfactory comprehension of this fundamental truth of our holy religion, he did not, until lately, enjoy a sensible realization of pardon and peace. This kind of struggle of a strong mind to subject Revelation to the authority of reason is not uncommon. No doubt it is hard for one accustomed to think, analyze and understand, to become as a little child—a learner at the foot of the Cross. But, subordinating his pride of intellect and pride of life to a simple effort of faith—and inspired by the Holy Spirit—a careful study of the Scriptures resulted in a sense of acceptance with God. He became the recipient of that purest, best and most sublime blessing ever vouchsafed to humanity—regeneration. And thus anointed, sanctified and accepted, his spirit entered rest—that rest which shall endure through eternal ages.

“ O gracious God ! not gainless is our loss ;
A glorious sunbeam gilds thy sternest frown ;
And while his country staggers with the cross,
He rises with the crown.”

Resolved, That this bar, his country, and his family, have sustained a great bereavement in the death of General Howell

he was endeared to us, by his manly, generous, professional companionship and association; to his sacrifices and services, and to his family, by affection, his considerate providence and wise that we deplore that one so dear to us, and so full of future usefulness should be called hence in the midst of all his powers; satisfied, however, that our great gain, we do not question the wisdom and propriety in transferring his spirit from earth to heaven. That our respectful sympathy and condolence are tendered to his family."

That this committee adopt the foregoing as their report on the present occasion, and request that they be entered in the minutes of this Court, and a copy be transmitted to the family of General Cobb by the Clerk.

SAMUEL HALL,
EUGENIUS A. NISBET,
WILLIAM EZZARD,
WILLIAM H. HULL,
DAVID A. VASON,
Committee.

—
ICE BROWN MADE THE FOLLOWING REPLY:

of the Bar: In behalf of the Court I submit the following reply to your report and resolutions: Lowell Cobb was no ordinary man. His name occupies a large space in the history of the country, and in the life of which he lived. Richly endowed by nature with strength, which had been developed and cultivated to a very high degree, he was eminently fitted for the responsible positions, which, by the free suffrage of his country, he was called to fill. To great ability and force of mind were added, industry and energy, forming a combination which seldom fails to achieve success. Cobb was admitted to the bar at an early age, as reported, and commenced the active duties of
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life as a Lawyer, in the Western Circuit, in this, his native State. With the advantages of a fine personal appearance, a mind remarkably active, logical and penetrating, aided by a liberal education, he rose rapidly to position and distinction, in his profession. But he was soon called, by the people, to lay aside, in a great measure, his professional pursuits, and to serve them, as he did during most of the remainder of his life, in high official positions, of great importance and responsibility.

In the Congress of the United States, where he served, during a long period of its proudest history, he not only won rank, as a man, but he exercised great control as a leader.

In the executive chair of his State, his administration was distinguished for ability, liberality, and a vigilant attention to all the duties imposed upon him.

Of the course of General Cobb, during the latter and more thrilling scenes, through which we have passed, I will not now speak. Justice requires that the history of these times, as it is to be transmitted to posterity, shall not be written; nor are the motives and conduct of men, who acted as prominent a part as did General Cobb, to be too freely criticised, till the passions and prejudices, which were engendered during the contest, have entirely subsided, and reason has resumed her sway. When posterity has seen results, the historian, with the materials which will be preserved and placed at his command, will be able to assign his proper position, to each of the leading spirits who took part in the war, and in the reconstruction of the government, after the disastrous and crushing defeat of the armies of the South, and the hopeless loss of her cause.

During the high excitement of the past, and the great conflict of opinion, as to what was the best that could be done for our almost ruined section, under all the circumstances by which they were surrounded at the close of the civil war, it was the misfortune of some of us to differ widely from General Cobb, and, in the excitement of the times, when men had too little charity for each other while sitting in judgment upon motives, those differences may, in some

ases, have been productive of personal alienation, which led to crimination and recrimination.

But, all these differences, which grew out of conflicting opinions on public policy, in times of high political excitement, and produced alienation and estrangement, are evanescent and soon pass away. In the grave they are forgotten. And when, under Divine Providence, one party precedes the other, for a little while, to that habitation which awaits all the living, they are never remembered and cherished by an honorable and generous survivor.

General Cobb was not only an honorable, upright citizen, in all the private walks of life, but he was distinguished for many noble traits of character, and many private and social virtues. In his death, Georgia has lost one of her ablest statesmen, the bar one of its brightest ornaments, society one of its most cherished members, and his intelligent and amiable family an affectionate, kind, indulgent husband and parent.

But, relatives, friends and professional associates, as well as States and nations, must bow in submission to the afflictive dispensations of Providence, and we trust all say reverently, "Thy will be done."

It affords the Court pleasure to testify their respect for the memory of General Cobb, as a distinguished member of this Bar, by directing that the preamble and resolutions be entered upon the minutes of this Court, in compliance with the request therein contained. And it is so ordered.

A true extract from the minutes.

INDEX.

L. is for Rules of Superior Court; R. S. C., for Rules of Supreme Court, and E R for Equity Rules. For convenience, the numbers formerly used are preserved. "Headnotes are made by the Judges." Georgia Reports, 33.]

ABATEMENT OF LEGACIES.

A money legacy left to the executor of a will, though expressed to be "in addition to the usual commissions obtained by law, and as a full compensation for any extra trouble he may have in executing the will," is a general legacy, and cannot, as a legacy, be exempted from abatement with other general legacies, in case of deficiency of assets. *Clayton vs. Akin, et al.*..... 320

When a legacy left to a wife is expressed to be in lieu of dower, and she elects to take the "legacy," she takes as a *quasi* purchaser, and in a contest between her and other legatees, whether general or specific, she cannot be called upon to abate with them, to make up deficiency of assets. *Ibid.*

ABATEMENT OF NUISANCE.

Nuisance, 1, 2.

ABSENCE OF COUNSEL. See *Continuance*, 4.

ACTION: See *Commencement of Action*.

ADEEMPTION, OF LEGACIES.

A legacy in Georgia, may be adeemed, by the delivery of the property to the legatee, during the life-time of the testator, and if it be so adeemed, it does not pass under the will, and is not subject to abate on a deficiency of assets. *Clayton vs. Akin, et al.*..... 320
Whether a legacy has been in fact adeemed; is a question of fact to be left to a jury, under the evidence in the particular case. The "delivery" to the legatee must be of such a character as to show that it was the

intent of the testator to part at that time irrevocably with his dominion over the property. *Ibid.*

3. By the third item of the will of A. V., he gave to his wife, during her widowhood, certain negroes and other personal property, and about five hundred and twenty acres of land, known as his "Home place." In case of her marriage, the negroes were to be divided into three lots, she to take one, and his two youngest sons each one share, and his said two youngest sons to take the balance of the property in said third item, including the "Home place," which was to be held by their guardian till they were of age. Testator afterwards sold the "Home place" to K. for \$10,000, and took notes, and gave bond for titles. After this sale, he added a codicil to his will, in which he expressed his purpose to give direction to a "certain fund that he shall have," and recited the fact of the sale of the "Home place" for \$10,000, and directed that "said sum of money" be invested by his executors, in a plantation for the use of his wife during her widowhood, and if she should marry again, said plantation to go to his two youngest sons, as set forth in the third and fourth items of his will. He afterwards collected two thousand five hundred dollars of the purchase-money, which he used, and soon after died. The balance of the purchase-money has never been paid, the title to the "Home place" remains in the estate, and K., the purchaser, is insolvent. *Held*, that there was an ademption of the specific legacy to the extent of the \$2,500 collected and used by the testator before his death, and as there is nothing for the codicil to act upon till the purchase-money due at his death, (which is the "certain fund" that was the object of it,) is collected, the codicil made under a mistake, did not revoke the will, as to the "Home place;" and that the widow and two youngest sons take it, under the third item of the will. But should the purchaser, at a future time, pay the balance of the purchase-money and interest, and compel a conveyance of the land, the codicil will then attach to the fund, when so paid in, and it will be the duty of the executors to invest it in a plantation for the widow and children as directed in said codicil. *Whitlock, et al., vs. Vaun*..... 562

ADMINISTRATORS AND EXECUTORS.

1. If an administrator or executor pay debts of an estate with less than is due upon them, he shall not take the benefit of it himself; but other creditors and legatees shall have the advantage of it. The estate is entitled to all the benefits arising from such payment, and not the executor personally. *Caruthers and wife vs. Corbin, Ex'r*..... 75
2. When a testator appointed four executors to execute his will, and an application was made to the Ordinary to require three of the executors to give bond and security according to the provisions of the 2411th section of the Code, upon the ground that said executors were *mismanaging* the estate of the testator, and said cause having been tried in the Superior Court, on appeal from the Court of Ordinary, and the jury having returned a verdict requiring the executors to give bond and security, and a motion having been made in the Court below for a new trial, which was overruled. The *insolvency* of the executors is not *per se* a sufficient ground to require the executors to give bond and security, especially, when it appears from the evidence in the record, that their *pecuniary* condition is as good *now*, as it was at the time of their appointment by the testator. *Wilson, et al., Ex'rs, vs. Whitfield*..... 269
3. The turning over to one of the executors, by the widow, shortly after the testator's death, of a large amount of promissory notes and other evidences of debt, which, said executor has continued to hold and retain in his possession, with the consent and approbation of two of the other executors, against the *protestation* of the fourth named executor, is not *per se* such *mismanagement of the estate*, as will require the executors to give bond and security under the law. *Ibid.*
4. The Court erred in charging the jury, "that if more than one qualifies, each is authorized to discharge the usual functions of an executor, but all must join in executing a *special* trust, and I refer you to the will to ascertain whether it contains a *special* trust," whereas, the Court should have charged the jury, whether the will did, or did not, contain any *special* trust, that being a question of *law* for the Court to decide, and not a question of *fact* to be referred to the jury. *Ibid.*
5. The Court erred in not granting a new trial, upon the

ground, that the verdict of the jury was strongly and decidedly against the weight of the evidence, as to the mismanagement of the estate by the executors. *Ibid.*

6. It was competent to show that the investment, or changes of investment, were prudent. *Campbell vs. Miller, et al.*..... 304

7. When the testator directed that all his property be kept together during the widowhood of his wife, to be used for the support and maintenance of his wife, and the education of their minor children, and that his executors give off to each of his minor sons, as they might come of age, and to his daughters, as they might come of age or marry, about thirty-one or two hundred dollars in money or property, as may be the most convenient to the estate, and most suitable to the party receiving property; and in order to enable his executors the more conveniently to carry out the foregoing objects, he thereby gave them power to sell any of the property, and to *buy* or to *exchange* for other property, taking care to give a full statement and history of all such sales, purchases and exchanges, to the Court of Ordinary: *Held*, that it was the intention of the testator to give the executor power to sell at private sale, and that such sale by him, if fairly and honestly made, conveyed a good title to the purchaser. *Mattox vs. Eberhart, Adm'r.*..... 581

See *Emancipation*, 1, 2, 3.

“ *Intruders*, 4. 5.

ADMISSIONS—See *Equity Practice*, 3.

“ in Ejectment cases, see *R.* 25.

“ by attorneys, see *Consent by Attorneys*, and *R.* 20, and *R. S. C.* 4.

“ to the bar, *R.* 2, and *R. S. C.* 1, 2 and 3.

ADVERSE POSSESSION. See *Ejectment*, 1, 2.

AFFIDAVIT.

See *Intruders. Pleadings*, 1:

AFFIDAVIT—To plea, *R.* 24.

“ of illegality, *R.* 30, 31.

“ in response to notice to produce papers, *R.* 47.

AFFIRMATION—Of administrator or executor to denial of deed, *R. 29.*

AGENT. See *Principal and Agent.*

AGREEMENT OF COUNSEL. . . . :

See *Consent of, R. 20, and R. S. C. 4.*

ALIMONY.

On the hearing of a motion for temporary alimony, pending an action for divorce, the merits of the cause are not in issue. But, under section 1735 of the Code, the Judge, fixing the amount of alimony, *may* inquire into the cause and circumstances of the separation, rendering the alimony necessary, and, in his discretion, may refuse it altogether; or he may grant such alimony, including the expenses of the litigation as the condition of the husband, and the *facts* of the case may justify. But the Judge should exercise a sound discretion, and should be careful that he does not so use this discretionary power, as to encourage the separation of husbands and wives, and increase litigation of this character. *Dicken vs. Dicken*..... 663

After looking into the cause and circumstances of this separation, we are satisfied the Judge did not abuse the discretion vested in him by the statute. *Ibid.*

ALLOWANCE.

See *Widow, 1, 2.* See *Equity, 5.*

AMENDMENT.

When a bill was filed against a partnership, and after both have answered, one of the firm dies, it is not error to permit, before parties are made, an amendment, correcting a misnomer as to the Christian name of the deceased partner. *Pearce, et al. vs. Bruce & Co*..... 444

When a suggestion is, in fact, made of the death of a party, and entered on the Judge's docket, it is not error, even after judgment, to allow the entry to be made on the minutes, *nunc pro tunc.* *Ibid.*

See *Reed & Brother vs. Spencer, 594.*

See *Commencement of Action.* ..

ANSWER.

See *Equity Pleading and Practice*, 3.

APPEAL.

1. An appeal should not be dismissed because of insufficiency of the security, until the appellant has been required to give other security, or shew why the appeal should not be dismissed. *Thon The Georgia Railroad and Banking Company.*

See *Bankruptcy*.

“ *Emanuel vs. Smith & Richmond*, 603.

“ *R. 1 and 11*.

ARBITRATION.

1. In an affidavit filed to prevent an award from being the judgment of the Court, under the Code, it is not sufficient to state, in general terms, that the award is the result of accident, mistake or fraud, or is wholly illegal; the affidavit must state such facts as show the accident or mistake, or designate such facts as show that the Court may see that a mistake, etc., has occurred, and that it was material to the issue. *Schaffer & Co., vs. Baker & Carr*.
2. When the issue, in an arbitration, was that certain bales of cotton, and two written by the same person, a marker and weighed, one describing the cotton as marked with the other “C O” and no explanation of the discrepancy, it was not a mistake or illegal award. Arbitrators to “set aside” or give no award. *Ibid.*

ARGUMENT OF C.

See *R. 3, 4, 7, 8, 13, 45, and S. C. 1*.

ARREST OF JURY.

See *Criminal Law*, 5, 10, and *R. 1*.

ASSIGNMENT.

Under the law, as it now stands, a debtor may assign property in trust, for the benefit of his creditors.

tors, to the exclusion of others; *Provided*, no trust or benefit is reserved to the assignor, or any person for him. *Embry & Fisher vs. Clapp*..... 245

ASSIGNMENT OF ERRORS.

See *Bill of Exceptions*, 2.

ATTACHMENTS.

See *Liens*. See *S. C. R.*, 18.

ATTORNEYS—*R.* 2 to 11 inclusive; *E. R.* 3, and *S. C. R.* 1 to 7, inclusive.

“ admission to bar, *R.* 2, and *S. C. R.* 1 to 3, inclusive.

“ form of license of, *R.*, 2.

“ liability for costs, *S. C. R.* 16, 18.

“ arguments of, *R.* 3, 7, 8, and *R. S. C.* 6, 7.

“ contempts by, *R.* 4, 8, 9, 11.

See *Consent by*, and *R.* 20, and *R. S. C.* 4.

AUDITORS. *E. R.* 5.

AUGUSTA.

1. The Statute of 15th February, 1856, enacts that the City Council of Augusta shall be and they are hereby authorized to elect an officer to be known as Recorder, in whom they may vest exclusive jurisdiction of all violations of their ordinances, etc. The Act also provides that the said Recorder shall be elected and hold his office for the term of two years, shall take an oath *before the Mayor* well and truly to discharge the duties of his office, etc. *Held*, that the object of this Act was to promote good government and order in the city, and that it was the duty of the Council to elect a Recorder, and that it was clearly the intention of the legislature, that the office of Mayor and the office of Recorder, should be separate and distinct offices, filled by different persons, one of whom is required to take the oath of office before the other, and that the provision in the statute which authorized the City Council or Mayor, in the absence of the Recorder, to appoint one of their body to preside in the Recorder's Court, contemplates the temporary absence of the Recorder, and does not authorize the City Council to abolish the office of Recorder, and direct the Mayor

permanently to act as Recorder. *Vason vs. The City of Augusta*..... 542

2. The City Council of Augusta have power to establish such by-laws, rules and ordinances as shall appear to them requisite, and necessary for the security, welfare and convenience of the city, or for preserving peace, order and good government within the same, not repugnant to the Constitution and laws of the land. *Ibid.*

AUTREFOIS ACQUIT.

When a party has been discharged and acquitted by the order of the Court, as provided by the 4554th section of the Code, of an offence for which he was indicted, and is afterwards indicted a second time for the *same criminal acts* as alleged in the first indictment, though under a different *named offence*, he may plead his discharge and acquittal under the first indictment, in bar of the second. *Holt vs. The State*..... 187

AWARD. See *Arbitration*.

BAIL—*Attorney may not be, R. 11.*

BAILEE. See *Common Carrier*.

BANKRUPTCY.

1. Security on an appeal bond, under our Code, only binds himself for the payment of the debt or damages for which *judgment may be entered* in the cause, and if no judgment is ever entered against the principal in the cause, no liability attaches to the security. As Congress has the power, under the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, and as the Act of Congress forbids the prosecution of an action against a person adjudged a bankrupt, until the question of his discharge has been determined, and relieves him, when discharged, from all debts and liabilities, etc., which might have been proved against his estate, a security on an appeal, in this State, is no longer liable, when the principal is discharged in bankruptcy; which discharge of the principal terminates the case pending in the State Court against him, and prevents any judg-

ment. The security on the appeal does not contract to pay the debt, but the judgment that may be entered in the suit then pending. *Odell vs. Wootten*..... 224

BILL OF EXCEPTIONS.

When an order was made in an equity cause, setting the same down for trial, to ascertain whether the complainant's claim had been finally adjudicated by a former decree of the Court: *Held*, that the granting such order, was not such a final disposition of the cause as will entitle the party complaining to bring up that decision to this Court, upon a bill of exceptions thereto, under the 4191st section of the Code. *Brady, Adm'r, vs. Furlow, Price & Furlow*..... 108

When a bill of exceptions is filed and error assigned on the rulings of the Judge of the Superior Court on the trial of the cause, the bill of exceptions and the assignment of error must show distinctly the points decided, with such statement of the facts as are necessary to an understanding of the points made, and if the bill of exceptions fails to do this, this Court will not pass upon the rulings complained of. *Dunnagan et al., vs. Dunnagan et al.*..... 554

When a motion for a new trial was made in the Court below, which was granted, and that decision is brought by writ of error, to this Court, a brief of the oral, and a copy of the written evidence adduced in the Court below, must be embodied in the bill of exceptions, or attached thereto as an exhibit, when presented to the Judge for his certificate, and identified by his signature on the same as a true copy, and constitute a part of the same, or the writ of error will be dismissed. *White vs. The Newton Manufacturing Company*..... 587

In a motion for new trial, a brief of the evidence agreed upon by the parties, and approved by the Court without such agreement, in case they fail to agree, must be filed in the Clerk's office. But such brief of evidence constitutes no part of the record, and need not be recorded by the Clerk, and as it is embodied in the bill of exceptions, should not be embraced in the copy of the record sent up to this Court. *Ibid.*

The record in a case in the Superior Court, consists of the declaration, process, return of service by the sheriff, and other official entries, plea, verdict, judg-

ment, and all interlocutory orders passed by the Court during the pendency of the case, and in case of a motion for a new trial, an order *nisi*, and an order granting or refusing a new trial, together with any order passed by the Court, setting it down for a hearing in vacation, or adjourning the hearing from time to time, and in case a new trial is granted, all subsequent orders passed by the Court, including the final judgment. *Ibid.*

6. When a case was tried, and a verdict rendered in favor of the plaintiff, and a motion was made for a new trial, and the Judge who heard the case went out of office before the motion was disposed of, and no brief of the evidence was agreed upon by the parties, or approved and certified by the Judge to be correct: *Held*, that the Judge who succeeded to the bench committed no error in refusing to grant a new trial. *Reed & Brother vs. Spencer*..... 59
7. A brief of the oral, and a copy of the written evidence adduced in the Court below, must be embodied in the bill of exceptions, as certified by the Judge, or the case will be dismissed on the hearing in this Court. *Ibid.*
See *S. C. R.*, 8 to 11 inclusive.

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CERTIORARI.

By the 3978th section of the Code, the Judge of the Superior Court may issue a *certiorari* to correct errors in the Inferior Court, and Court of Ordinary. *Barrett, Adm'r vs. Jackson, et al.*..... 181

See *S. C. E.*, 9. .

CESTUI-QUE-TRUST. See *Emancipation*, 1, 2, 3.

CHALLENGES TO JURY.

See *Criminal Law*, 2.

CHARGE OF THE COURT.

1. When the charge of the Court assumes certain things as facts, and is in such shape as to intimate to the jury what the Judge believes the evidence to be, and that they made defendant guilty, a new trial will be granted. *Whitley vs. The State*..... 50
2. Where a distress-warrant, for rent due by the contract, in American gold coin, was taken out, and an issue was made as to the amount due, under the 4012th section of the Code: *Held*, that it was not error for the Court below to charge the jury in accordance with the law as determined by this Court, in that particular case. *Kaufman vs. Myers & Marcus*..... 133
3. On an issue on the return of commissioners to assign dower, it is error for the Court to charge the jury, that in estimating the value of the land (other than the dwelling house and curtilage,) they ought not to consider improvements, such as log dwellings, etc., "unless these improvements are of considerable value, such as a two-story house," etc. *McKibbon vs. Folds*..... 235
4. When there is evidence before the jury on the trial of a case upon a material point involved in such trial, it is error for the Court so to charge the jury as to exclude from their consideration such evidence. *Lamar vs. Glawson*..... 252
5. The Court erred in charging the jury; "that if more than one qualifies, each is authorized to discharge the usual functions of an executor, but all must join in executing a special trust, and I refer you to the will to ascertain whether it contains a special trust," whereas, the Court should have charged the jury, whether the will did, or did not, contain any special trust, that being a question of law for the Court to decide, and not a question of fact to be referred to the jury. *Wilson, et al. vs. Whitfield, et al.*..... 269
6. When the Court is requested to charge the jury in writing, he should read his charge, and make no verbal additions or explanations. A written request to charge the jury must be applicable to the facts and the law, or the Court need not notice it. The Court may,

if he please, charge the jury by verbally modifying it, provided his charge, as given, is the law. *Campbell vs. Miller, et al.*..... 304

CLAIMS. R. 13, 14, 15.

CLERK OF SUPERIOR COURT, *Duty of*,
R. 2, 16 to 19, inclusive, and R. S. C. 11.

CLERK OF SUPREME COURT, *Duty of*,
R. S. C. 15, 19, 20, 25, 27 and 28.

COLLATERAL SECURITY.

1. L., who owed S. \$1,000, for which S. held L.'s note and mortgage on a printing press, sold the press to C. for \$5,000, and C. agreed to pay the \$1,000 to S., and satisfy the note and mortgage, but S. refused to release L. and take C. for the debt. There was evidence before the jury, however, that S. agreed to take C. as collateral, and afterwards agreed to give C. time on the \$1,000, which he was to pay for L., if he would pay him two and a half *per cent.* per month for the indulgence, which he did for three or four months: *Held*, that it was error in the Court, in his charge to the jury, to restrict them to the single inquiry whether C. was substituted as the debtor, in place of L. *Lockrane vs. Solomon*..... 286
2. If C. agreed to pay the debt of L. to S. in a short time, and S. having accepted the liability of C. as collateral, *afterwards* for a valuable consideration, extended the time of payment for three or four months, as he had the right to do at his own risk, L. could not sue C. during that time, and S. was liable to L. for any damage sustained by L. on account of such indulgence given by S. to C. *Ibid.*

COMMENCEMENT OF ACTION.

When a new lessor of the plaintiff is introduced by way of amendment to an action of ejectment, the case, as to that demise is to be tried as though the action had not been commenced until the date of the amendment. *Pollard vs. Tait, Ex'r*..... 439

COMMISSIONS, TO TAKE TESTIMONY, *Form of*,
R. 32 to 33, inclusive.

COMMON-CARRIER.

When a common-carrier receives goods for transportation, and in case of the loss of the goods, seeks to protect himself from liability therefor, on the ground that the goods were destroyed by the public enemies of the State: *Held*, that as the presumption of law is against the carrier, in case of loss, it is incumbent on him to prove, by clear and satisfactory evidence, that the goods were so destroyed whilst in his possession, in order to exonerate him from liability therefor. *Van Winkle & Co. vs. The S. C. R. R. Co.*.....

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When the agent of the Southern Express Company, at Augusta, receipted for a package of goods to be shipped, marked "C. A. Robinson, Cartersville, Ga.," and in the printed receipt given by the agent of the company to the shipper, the following words were inserted: "which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation:" *Held*, that in case of the loss of the goods, the company was liable therefor, and could not protect itself from its legal liability by showing that its line of transportation extended only to the city of Atlanta, especially when the evidence in the record shows that fact was not known to the shipper, or communicated to him, at the time of receiving the goods, by the agent of the company. *HARRIS, J.*, dissenting. *Held, also*, that the evidence in the record, showing that the goods were seized by legal process, without more, was not sufficient to exonerate the company from its legal liability as a common-carrier. *Mosher & Co. vs. Southern Express Co.*.....

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When a common-carrier receives and receipts for goods, to be transported beyond the terminus of his own line, he undertakes to transport the goods to the point of destination, either by himself or competent agents, and if the goods are lost beyond the terminus of his own line, he will be liable therefor. *Southern Express Company vs. Shea*.....

519

When an express contract was made between the plaintiff and the Adams Express Company for the transportation of goods from New York to Macon, Georgia, and the goods were lost when in the possession of the Southern Express Company, as the agents

of the former company, to complete the transportation under the original contract of bailment: *Held*, that the plaintiff's right of action, for the loss of the goods was against the Adams Express Company, with which he made the contract for the safe transportation of the goods to the point of destination, and not against the Southern Express Company. *Ibid.*

CONFEDERATE CURRENCY.

1. If a creditor receive, in payment of his debt, a depreciated currency at its nominal value, without fraud or mistake, he will be bound by such payment. *Caruthers and wife vs. Corbin, Ex'r, et al.*..... 75
2. A trustee in possession of promissory notes as trust property, may receive payment of said notes in such currency as a prudent man, under the like circumstances, would receive in payment of debts due him individually. *Campbell vs. Miller, et al.*..... 304
3. A trustee who, during the war, in good faith, received Confederate Treasury notes, in payment of promissory notes held by him in trust, acted under color of law, and is protected by the Act of 1866, and the Ordinances of the Conventions of 1865 and 1868. If the trustee received Confederate currency before the adoption of the Code; and after its adoption invested it in securities not authorized by law, and without an order of Court, he did so at his own risk, and is liable for the value of such currency at the time when it is said to have been re-invested. *Ibid.*
4. Confederate currency paid and credited on a note for its nominal value, extinguished the note to the amount of that nominal value. *Green et al., vs. Jones et al.*... 347
5. When a contract was made between two citizens of the late Confederate States during the war, on the 12th of July, 1862, payable three years after date, the consideration of which was Confederate Treasury notes, the only circulating currency in the country, at that time, and which was recognized as *lawful* by the assumed authority which had the *actual* possession and control over the country and people at the time the contract was made: *Held*, that although the issuing of such notes by the assumed Confederate authority for the purpose of carrying on a war against the Government of the United States, may have been illegal as against

that Government, and the citizens thereof, who, during the war, were under the *actual* protection of that Government, *outside* of the lines of the assumed authority; yet, such a contract made between citizens residing *within* the lines of the assumed Confederate authority, in their ordinary business transactions between themselves, and having *no connection with the prosecution of the war against the United States*, is not an illegal consideration, as *between the contracting parties themselves*, they having made the contract under the assumed authority which was then over them, and which assumed authority, (whether rightful or otherwise, is not now the question,) *recognized the currency as legal, and valid, at the time the contract was made*; therefore, as between the *contracting parties themselves*, the plaintiff is entitled to recover. BROWN, J., dissenting. *The Georgia Railroad and Banking Co. vs. Eddleman and Miller vs. Gould*..... 465

The contract in the record mentioned, is not such a contract made with the *intention*, and for the *purpose*, of aiding and encouraging the rebellion, as was contemplated, or is embraced within the provisions of the Constitution of this State. *Ibid.* BROWN, C. J., dissenting.

CONSENT OF COUNSEL.

When a contract was made between two attorneys, representing their clients, that if the defendant would not *certiorari* the decision made by the County Court establishing copies of certain lost notes, the defendant should have the right to file the plea of *non est factum*, when suit should be instituted on the established copy notes, and the defendant performed his part of the contract in good faith: *Held*, that, in as much as the plaintiff had the benefit of the contract on his part, it would be a *fraud* on the defendant not to require the plaintiff to perform his part of the contract, although the same was not in writing. *Henderson vs. Merrett*.. 232
 R. 20 and 21, and R. S. C. 4.

CONSIDERATION—*Failure of.* See *Notice*.

CONSTITUTIONAL LAWS.

1. While the Courts have the power, and it is their duty, when a proper case is made, to declare Acts of the Legislature unconstitutional and void, such acts are always presumed to be constitutional, and the authority of the courts to declare them void should be exercised with great caution, and should never be resorted to but in clear and urgent cases. *Brown, C. J., in Cutts & Johnson vs. Hardee*..... 85
2. That provision of the Constitution of the United States which denies to a State the right to pass any law impairing the obligation of contracts, does not interfere with the right of a State to pass laws acting upon the remedy. *Ibid.*
3. There is a plain distinction between the *obligation* of a contract and the *remedy* for its enforcement, and while the Legislature may not impair the obligation of the contract, it has the undoubted right to change, modify or vary the nature and extent of the remedy, (provided a *substantive* remedy is always left to the creditor, so long as the State does not deny to her Courts jurisdiction of contracts,) and to prescribe such rules of procedure and of evidence as may, in its wisdom, seem best suited to advance the administration of justice in the courts. *Ibid.*
4. That part of the Act of the Legislature passed at its late session, entitled "An Act for the relief of debtors, and to authorize the adjustment of debts upon principles of equity," which provides for a change of the rules of the evidence, (under which the case originated,) is not unconstitutional, though it may permit evidence to go to the jury which has not heretofore been allowed, and which the Courts may consider irrelevant and improper. It is the province of the Legislature to prescribe the rules of evidence and of the Courts to administer them. *Ibid.*
5. It is no objection to the constitutionality of this Act that it authorizes the jury to reduce the amount of the debt sued for, according to the equities of the case, as this is done every day in Court, in cases of partial failure of consideration, and the like. This must be done, however, according to the real equities between the parties, and not according to the caprice of the jury; and when so done, it neither impairs the obligation of

he contract nor works injustice to the parties litigant. *Ibid.*

If this should be seized upon by the jury, and used as a pretext for reducing the debt otherwise than the equities between the parties permit, it will be the duty of the Court to set aside the verdict when that fact is made plainly to appear. *Ibid.*

In this case, the obligation of the contract was not in any degree impaired by the filing of the pleas by the defendant, to which objection was made, as a foundation for the introduction of evidence under the statute, and the evidence should have been received, and if the jury had made an improper use of it, or found contrary to law and evidence, it would then have been time enough for the Court to interfere and set aside the verdict. *Ibid.*

When the statute authorizes certain facts to be given in evidence, a demurrer to a plea which lays the foundation for such evidence, should not be sustained. The old rules of pleading in such case must yield to the statute. *Ibid.*

CAY, J., concurring:

It is not to be presumed that the Legislature intends to violate the Constitution of the United States, and when words are used in an Act, they ought to be construed, if possible, so as to make the Act consistent with that Constitution. *Ibid.*

The consideration of a contract, and whether there has been a tender of the whole or any part of a debt sued on, and if the debt was not paid, that it was the creditor's fault, are not only, in all cases, fit matters for proof, but are often of great importance in arriving at proper conclusions as to the true rights of the parties in the matters before the Court. Nor can such evidence, in any proper use of it, at all tend to impair the obligation of the contract sued on. *Ibid.*

If the property, upon which the credit was given in the contract, has been lost, or rendered worthless, it is competent for the Legislature to permit the defendant, when the contract is sued upon, to show by whose fault that property was lost or destroyed, and the value of it at the time of the contract, and at the time of the loss. *Ibid.*

12. That clause of the Act of the Legislature under discussion, which authorizes the jury, in suits upon certain contracts, to reduce the *debt* sued upon, according to the equities of each case, was not intended to permit them to impair the obligation of the contract of the parties. The equity and justice there meant, is that fair and honest duty which each owes to the other under the contract, to be gathered from the whole transaction, as it actually occurred between them, and from the acts creating legal or equitable obligations, which have happened between them since the date of the contract. *Ibid.*
13. The obligation of a contract cannot be impaired by the Legislature of a State, under the guise of changing the rules of evidence, or altering the mode of procedure. Nor can the Legislature authorize a Court or a jury so to adjudicate between the parties to a contract as to alter or impair its obligation, as it was, in fact, entered into. *Ibid.*
14. Consistently with these principles, a State Legislature may alter the rules of evidence, and change the mode of proceeding in the State Courts. Nor is it the province of this Court to declare an Act of the Legislature void, because it permits the introduction of evidence, which, in the opinion of the Court, may be irrelevant to the issue, and calculated to distract or mislead the minds of the jury. *Ibid.*
15. The Act of the Legislature in 1868, so far as it allows the defendant, in all suits upon the contracts dated before the first of June, 1865, to give in evidence the consideration of the debt sued on, whether any tender has been made, and if the debt was not paid, whose fault it was, what property the credit was given upon, and if that property has been lost, by whose fault it was, and so far as it authorizes the jury in such cases, to reduce the debt sued on, according to the principle of equity, is not, if construed according to the well established rules for the construction of statutes, in violation of that clause of the Constitution of the United States which prohibits any State from passing a law impairing the obligation of contracts. *Ibid.*
16. Should any Court of this State give to the Act in question, in any case tried before it, such a construction as would impair the obligation of the contract under

estigation, this Court, in a proper case made, will rect the error. *Ibid.*

a plea filed, setting up any facts which, by express actment of the Legislature, are permitted to be en in evidence, is not demurrable. *Ibid.*

NER, J., dissenting:

This was an action brought by the plaintiff against defendants, on a promissory note, for the sum of 229 00, dated January 22, 1861, and due forty- days after date.

Defendant, Stewart, filed a plea, setting up, by way defence to the note, certain facts, as provided by provisions of the first section of the Act of 1868, for the relief of debtors, and to authorize the adjustment of debts upon principles of equity." The plaintiff demurred to the defendant's plea, and the Court now sustained the demurrer, and the defendant excepted. The decision of this question necessarily involves the constitutionality of the Act of 1868. The 1st section of that Act provides, "that, in all suits which shall be brought for the recovery of debts, in any of the Courts of this State, or upon contracts for payment of money, made prior to the 1st of June, 1865, (except for the hire or sale of slaves), it shall be lawful for the parties, in all such cases, to give evidence before the jury impaneled to try the same, as to the consideration of the debt or contract which may be the subject of the suit, the amount and value of the property owned by the defendant at the time the debt was contracted, or the contract entered into, to which was given upon the faith of what property, credit was given to him, and what tender or tenders of payment were made to the creditor at any time, and that the non-payment of the debt or debts, was owing to the refusal of the creditor to receive the money tendered or offered to be tendered, the destruction or loss of the property upon the faith of which the credit was given, and how and in what manner the property was destroyed or lost, and by whose default, and in all such cases the juries, which try the same, shall have power to reduce the amount of the debt or debts sued for, according to the equities of each case, and render such verdicts as to them shall appear just and equitable." This Act of the Legislature, in my judgment, necessarily impairs the obligation of the contract, as it

existed under the law at the time the contract was made, and it makes no difference whether that result is produced under the name of a remedy, or under the pretext of regulating the admissibility of evidence. Is the contract and the obligation to perform it as valuable now, under the provisions of the Act of 1868, as it was under the law applicable to the contract at the time it was made? Ibid.

See Retroactive Legislation.

CONSTRUCTION OF STATUTES.

See Criminal Law, 9, 13, 14, 16, 17.

See Constitutional Law.

CONTEMPTS—*by Attorney, R. 4, 8, 9, 11, and R. S. C. 7.*
 „ *by Clerk, R. 18, and R. S. C. 9.*

CONTINUANCE.

1. Before refusing to continue a criminal case, the Judge should inquire what diligence has been used by the accused, when he learned that the witness would testify to a material fact, what opportunity he had had for preparation, when the transaction occurred, etc., and if the showing appears to be *bona fide* made, time should be given. *Whitley vs. The State*..... 50
2. When it appeared from the record that the venue in a murder case was changed, on the motion of the prisoner, at the April Term, 1868, from Gordon to Bartow county, and the case was called for trial at the November Term, 1868, of Bartow Superior Court, the defendant is *charged* with notice that the case will then and there be called, and he cannot excuse himself for want of diligence in preparing for trial, by his affidavit that he did not know the case had been moved to Bartow county, and would be called for trial at the next regular term. *Long vs. The State*..... 491
3. The simple fact that the defendant has been in jail, in a distant county, does not excuse him for want of diligence in preparing for trial. *Ibid.*
4. The unexplained absence of the counsel, on whom the defendant “mostly relies,” is not a good ground for continuance. *Ibid.*
5. When a motion is made to continue a criminal case, at the calling of the case, the movant must take all

his grounds; he cannot, after his motion has been overruled; file a special plea, based upon facts known at the time of the first motion, and then move to continue because not ready to try that plea. *Ibid.*

This Court will not interfere with the judgment of the Circuit Judge in a matter left by law in his wise, legal discretion, unless it appears affirmatively that the discretion has been abused. *Ibid.*

re Garnishment, 8.

re R. 22.

CONTRACTS.

Where A bargained to B certain slaves, which at the time were runaway, and B paid to A the price agreed upon, and it was agreed, at the time, between the parties, that if B did not, by a certain fixed time, get possession of the slaves, A should repay the money: *Held*, that this was only a conditional sale, and if B failed to get the negroes, there was no sale, and A holds the money for B's use, and B may recover it, and it is not a debt, the consideration of which is a slave or slaves. *Kimbrough vs. Worrill*..... 119

When two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness or negligence of the other, the Court will not lend its assistance in favor of either party to recover damages. The maxim of the law in all cases is, "*In pari delicto potior est conditio defendentis et possidentis.*" *Wallace, superintendent, vs. Cannon*..... 109

When A applied to the landlord to lease the premises for three years, which was refused, but it was agreed that he might rent for one year, and that the written lease should be executed at another time, and A laid down his notes for one year's rent on the landlord's table; which A afterwards claimed as the evidence of the contract, the notes not having been returned: *Held*, that the language used in the notes must be taken most strongly against A, and that the expression in the notes that they are for the rent of the store occupied by A, will not embrace a lot adjoining the store-house, fenced off to itself, which usually went with the store before it was so fenced. *McBurney vs. McEntyre*..... 261

4. When A sold to B a stock of merchandize in consideration that B. would pay a certain debt of \$500 00 due by A, to which B was security, and in further consideration that B would pay the debts due by A for the stock of goods, which amounted to \$1,500 00; *Held*, that the mode of payment was part of the consideration, and that even as to the \$1,500 00 A has no right of action against B until he fails or unreasonably delays to pay the debts due by A for the stock of goods.. *Watkins vs. Pope*..... 5

CONTRIBUTION.

- When a *fi. fa.* against two joint obligors, mutually interested in the consideration, is satisfied by the sale of the property of one of them, the other is indebted to him for contribution according to the equitable rights of the two in the original contract, and the creditors of the obligor whose property has been sold, may reach this obligation to contribute, by process of garnishment, and have, therefore, a remedy at law. *Kilgo vs. Castleberry*..... 5

CORPORATIONS.

1. When an attachment was levied upon fifty shares of capital stock of a corporate company, and sold at sheriff's sale, it was the duty of the sheriff to give a certificate of purchase to the highest bidder, and on presentation of such certificate to the proper officer of the corporation, it was his duty to make the necessary transfer of the stock to the purchaser on the books of the company. In such case, the sheriff does not put the purchaser in possession, but the proper officer of the corporation is, *pro hac vice*, a public officer under the Code, charged with that duty, and if he refuses to do it, *mandamus* is the proper proceeding to compel its performance. *Bailey vs. Strohecker*..... 256
2. A municipal corporation, the owner of a market, the stalls of which it rents, is bound to keep the pavement in front of the stalls in a safe condition, and if a citizen of the corporation is injured through neglect of this duty, by the officers of the corporation, the corporation is liable to the extent of the injury received. *M. and A. of Savannah vs. Cullins and wife*. 33
8. Where a voluntary society applies for a charter and is incorporated to support its objects, the acceptance

e charter subjects it to the supervision of the
er legal authorities having jurisdiction in such
Waring vs. The Geo. Med. Society 608

Georgia Medical Society is a private civil cor-
poration, and the corporators have a property in the
franchise, of which they cannot be deprived without
process of law. *Ibid.*

ninth by-law of this corporation is a legal and
proper one, in view of the objects of the society: but
the society has not an uncontrollable discretion in its
construction and enforcement. When a proper case
arises the Courts are to construe it, and judge of
the equality of the action of the society under it. *Ibid.*

superior Court of Chatham county, where this
corporation is located, has the visitorial power over
with authority to redress any wrongs which the
corporation may inflict upon its members. *Ibid.*

where a corporator has a clear legal right, which
has been violated by the corporation, and he has no
adequate legal remedy, he is entitled to relief
by *mandamus*. *Ibid.*

record in this case shows that the society cen-
sured Dr. Waring for doing that which the law not
authorizes but encourages, and the return to the
habeas corpus nisi shows no sufficient cause for his ex-
clusion. He is, therefore, entitled to a peremptory
mandamus commanding and compelling the society to
restore him to all his rights and privileges as a cor-
porator. *Ibid.*

CO-OBLIGORS. See *Joint Obligors*.

See *Fees*.

S. C. 16, 17, 18. R. 23, 55.

CRIMINAL LAW.

On refusing to continue a criminal case, the Judge
should inquire what diligence has been used by the
prosecutor, when he learned that the witness would tes-
tify to a material fact, what opportunity he had had
for preparation, when the transaction occurred, etc.,
if the showing appears to be *bona fide* made,
relief should be given. *Whitley vs. The State*..... 50
When negroes were, as *tales* jurors, put upon the
panel, and he challenged the array, and, by con-
sequence, the negroes were put off the jury, and the pri-

- soner made no further objection to the panel, his challenge to the array was waived. *Ibid.*
2. Dying declarations of opinions, not facts, are inadmissible as evidence. *Ibid.*
 4. When the charge of the Court assumes certain things as facts, and is in such shape as to intimate to the jury what the Judge believes the evidence to be, and that they made defendant guilty, a new trial will be granted. *Ibid.*
 5. The bill of indictment contained but one count, which was for murder. The jury returned a verdict of guilty of "involuntary manslaughter," which was received by the Court, and the jury discharged. A motion was made in arrest of judgment, on the ground that there are two grades of involuntary manslaughter, one punishable as a felony, the other by less punishment: *Held*, that the motion should have been sustained by the Court. *Thomas vs. The State* 117
 6. Upon the trial of a defendant who was indicted for burglary under the Code, for breaking and entering a store-house, alleged to be the property of certain parties therein named: *Held*, that *parol* evidence of the fact that the parties named in the indictment were in the possession of the store-house under a written contract of lease at the time of the alleged burglary, was sufficient to sustain the allegation of ownership of the premises, in the indictment, without the production of the written contract of lease. *Houston vs. The State* 165
 7. Where two persons were indicted for a riot, under the 4441st section of the Code, and the name of one of the defendants was spelt Land, in one part of the indictment, and Lance, in another part of it: *Held*, that upon the trial of one of the defendants separately, although the evidence showed that the name of his confederate was Lance, yet there being no doubt as to the identity of the man, whether he was called by the one name or the other, conviction was right under the facts of the case. *Davenport vs. The State*. 184
 8. When a party has been discharged and acquitted by the order of the Court, as provided by the 4554th section of the Code, of an offence for which he was indicted, and is afterwards indicted a second time for

the *same criminal acts* as alleged in the first indictment, though under a different *named offence*, he may plead his discharge and acquittal under the first indictment, in bar of the second. *Holt vs. The State.* 187

A witness for the State, in a criminal case, who, in obedience to a *subpoena* served upon him while temporarily in this State, actually comes from his home, in a distant State, where he resided when the *subpoena* was served upon him, and testifies in the cause, is entitled to mileage from the county treasury, for the whole distance traveled in coming from and returning to his home. *Dutcher vs. J. J. Fulton Co.*..... 214

. It is too late after arraignment, and the case is before the jury, to object to an indictment on the ground that it fails to allege the residence of the defendant. *Long vs. The State.*..... 491

. The plea of insanity, provided for in section 4234 of Irwin's Code, is, in its nature, a plea, the object of which is to prevent a trial on the merits, and though it may cover insanity at the time of the act, its essence is that the prisoner is insane at the trial, and it must contain that allegation. *Ibid.*

. It is not error for the Court, in a criminal case, to refuse to charge the jury that if from *any cause* they have doubts of the prisoner's guilt, they must acquit, and to charge instead, that *any cause* is too sweeping, but that if they have any reasonable doubts which arise from, or grow out of the evidence, they must acquit. *Ibid.*

. The jury, in a murder case, have no right in this State authoritatively to recommend, in lieu of the death penalty, imprisonment for life, except in cases where the conviction is founded solely on circumstantial evidence, and it is no ground for a new trial that the Judge in this case said to the jury, "if there are palliating circumstances, or good legal reasons, you may so recommend." *Ibid.*

. Any person who shall erect or continue, *after notice* to abate, any nuisance, which tends to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, is liable to indictment under the Penal Code of this State. The legal offence of continuing a nuisance is not complete before notice to abate. And until the notice is given,

and the legal offence is complete, the city authorities have power as a police regulation, to punish for the continuance of such nuisance, as would subject the offender to indictment after notice to abate. But when the offence against the Penal Code is complete, they have only the power to bind over the offender to the proper Court, to answer for the offence. *Vason vs. Augusta*..... 542

15. A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises, by the tenant, during the lease. If the nuisance existed upon the premises when the lease was made, the landlord is liable. *Ibid*,

16. Penal laws are to be construed strictly in *favorem civitatis*. Sec. 4251 of the Code declares that, "Any person convicted of the offence of insurrection or an attempt at insurrection, shall be punished with death; or if the jury recommend to mercy, confinement in the penitentiary for a term not less than five nor more than twenty years." *Held*, that this prescribes no penalty for the offence of an attempt to incite insurrection. *Gibson vs. The State*..... 571

17. The penalty for the crime of burglary was changed by the Legislature between the commission of the crime by the defendant in this case and the time of his trial: *Held*, under section 4570 of the Revised Code, that the defendant was properly prosecuted and punished under the laws of force at the time the crime was committed. *Jordan vs. The State* 585

CUSTODY OF OFFICE PAPERS. R. 18 and 19, and 46, and S. C. R. 5, 11, 24, 25.

DAMAGES.

When two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness, or negligence of the other, the Court will not lend its assistance in favor of either party to recover damages. The maxim of the law in all such cases is, "*In pari delicto potior est conditio defendentis et possidentis.*" *Wallace Supt. vs. Cannon* 199

See *Measure of Damages*.

DECISIONS OF SUPREME COURT.

1. A bill was filed, to enjoin a writ of possession in an ejectment case, after the judgment therein had been affirmed by the Supreme Court, alleging that the Supreme Court had, in its judgment, mistaken or overlooked material facts: *Held*, that the bill was properly dismissed on demurrer. *Russell vs. Slaton*..... 195
2. The judgment of the Supreme Court in a case, is a judgment *affirming* or *reversing* the judgment below, and is final and conclusive between the parties on the matters involved in that trial. The opinion of the Court, on the law of the case, does not stand on the same footing, and may be overruled, after argument, if shewn to be erroneous, even if unanimous. *Ibid.*
Defense R., 24; *Default R.*, 23.

DE MINIMIS. See *Charge of the Court*, 3.

DEMURRER. See *Equity*, 1, 3.

DE SON TORT. See *Executors de son tort*.

DEVISE. See *Will*.

DISCRETION OF JUDGE.

See *Alimony*, 1, 2; *Continuance*, 6; *Garnishment*, 3, 7; *Injunction*, 1; *Equity Pleading and Practice*, 1; *R.*, 1, 27; and *R. S. C.*, 21.

DISTRIBUTION OF ESTATES.

1. The heirs-at-law of an estate may, as between themselves, divide the estate by agreement, without administration; but, as against creditors, if they convert to their own use the personal effects, they are executors *de son tort*, and are liable as such. *Barron vs. Burney et al.*..... 264
2. Although, under the Code, executors *de son tort* cannot get credit for any debt they may have paid; yet, if, in good faith, they have furnished the widow her year's support, according to her circumstances in life, and this has exhausted the effects they have used, they are not liable, except for the excess. The claim of the widow is not a debt, but a special provision al-

lowed by law, in preference to any liens or debts held by creditors. *Ibid.*

3. A money legacy left to the executor of a will, though expressed to be "in addition to the usual commissions obtained by law; and as a full compensation for any extra trouble he may have in executing the will," is a general legacy, and can not, as a legacy, be exempted from abatement with other general legacies, in case of a deficiency of assets. *Clayton vs. Akin.... 3*
4. When a testator, in a single item of his will, gave to his wife \$1500 00 in money, various articles of personal property, and a life-estate in a certain house and lot, and its appurtenances, with the privilege, if she so desired, to take \$1,000 00 in money instead of the life-estate in the house and lot, and in a subsequent item distinctly declared that the "legacy" left his wife was in lieu of dower. The word "legacy," in the last item, covers all the several bequests of the first, and, should she prefer the \$1,000 00 in lieu of the life-estate, and elect to take her "legacy" in lieu of dower, she takes *all the several* bequests in her character as doweress. *Ibid.*
5. When a legacy left to a wife is expressed to be in lieu of dower, and she elects to take the "legacy," she takes it as a *quasi* purchaser, and in a contest between her and other legatees, whether general or specific, she can not be called upon to abate with them, to make up a deficiency of assets. *Ibid.*
6. A legacy in Georgia may be adeemed, by the delivery of the property to the legatee, during the life time of the testator, and if it be so adeemed, it does not pass under the will, and is not subject to abate on a deficiency of assets. *Ibid.*
7. Whether a legacy has been in fact adeemed, is a question of fact to be left to a jury, under the evidence in the particular case. The "delivery" to the legatee must be of such a character as to show that it was the intent of the testator to part at the time irrevocably with his dominion over the property. *Ibid.*

DIVORCE. See *Alimony*.

DOCKETS.

See *R.*, 26, 27, 54, and *R. S. C.*, 10 to 22, inclusive.

DOWER.

When the husband of a married woman died seized possessed of a tract of land, having the legal title thereto, the widow is entitled, under the provisions of the Code, to her dower therein; and the vendor's equitable lien for part of the unpaid purchase-money, which was not enforced during the lifetime of the husband, will not override or defeat the widow's legal right to her dower in the land. HARRIS, J., dissenting.

Clements vs. Bostwick et al...... 1

Where one who holds land adversely to the widow's right of dower, but who was not notified of the application, comes in, at the return term of the commission, contests the return, he can not object to the order of the Court appointing the commissioners, on the ground that one of them was not a free-holder.

Kibben vs. Folds, 235

When, in an issue on the return of commissioners to assign dower, the applicant opened the case by proof to sustain the return, and the contestant replied with an offer of attacking it, it is too late for the contestant to move that he has a right to open and conclude the argument before the jury. *Ibid.*

In an issue on the return of commissioners to assign dower, it is error for the Court to charge the jury, in estimating the value of the land, (other than a dwelling-house and outillage,) they ought not to consider improvements, such as log dwellings, etc., unless these improvements are of considerable value, as a two-story house, etc." *Ibid.*

When a testator, in a single item of his will, gave to his wife \$1500 00 in money, various articles of personal property, and a life-estate in a certain house and land and its appurtenances, with the privilege, if she desired, to take \$1000 00 in money instead of the life-estate in the house and lot, and in a subsequent item distinctly declared that the "legacy" left his wife in lieu of dower: Held, that the word "legacy," in the last item, covers all the several bequests of the money, and, should she prefer the \$1000 00 in lieu of life-estate, and elect to take her "legacy" in lieu of dower, she takes all the several bequests in her character as doweress. *Clayton vs. Akin* 320

DUTY—of Attorneys, R., 6, 9.
 of Clerks, R., 16 to 19 inclusive, and R. S. C.
 11, 15, 19, 24, 25, 27, 28.
 of Sheriffs, R., 52, 53, 54.
 of Surveyor, R., 55, 58.

DYING DECLARATIONS.

See *Criminal Law*, 3.

EJECTMENT.

1. An adverse possession of real estate, under written evidence of title, from the 5th of November, 1856, until the 24th of September, 1867, gives a good title against all persons not under disability to sue. *Pol-lard, tenant, vs. Tait, Ex'r*..... 439
2. Since the 1st of January, 1863, the time when the Code went into operation, there has not been any statute of limitations in this State, as to suits for real property. An actual adverse possession, under written evidence of title, for seven years, gives a good prescriptive right as against all persons not under disability to sue. *Ibid.*
3. A deed unrecorded can not be given in evidence as color of title without proof of execution. *Hightower, tenant, vs. Williams et al.*..... 497
4. When both parties derive title from the same person, plaintiff in ejectment need not show title into such person. *Ibid.*
5. A purchaser at sheriff's sale, under a mortgage *fi. fa.*, will be protected when the rule absolute shows upon its face that the rule *nisi* was served upon the mortgagor according to law. *Ibid.*
6. Service in such case, acknowledged by a general agent, without special authority, will be sufficient to protect the purchaser at sheriff's sale, in an action of ejectment, when the plaintiff in ejectment, who purchased from the mortgagor after the date of the mortgage, was in Court when the rule absolute was taken, and made no objection. *Ibid.*
7. A grant issued to Isaac O. Holland, orphan. It appeared by parol that there was no such person as Isaac O. Holland, orphan, in the district at the time of giving in for draws, but that Isaac O. Holland's

rphan, Mary Holland, was in the district, and did
ive in for a draw: *Held*, that parol evidence of these
acts may be given to the jury, not to prove a mis-
ake in the name of the grantee, but to give effect to
he grant, by identifying the person intended as the
rantee. *Tuggle and Wife vs. McMath et al.....* 648

EMANCIPATION.

By the laws of South Carolina, as they existed in
835, a will practically emancipating slaves was in-
alid, so far as such object was concerned ; but other
equests, in the same will, were not affected thereby.
Aruthers and wife vs. Corbin, Ex'or, et al..... 75

When a testator, who died in 1853, by will, directed
at his executors cause to be removed to a free State,
nd *there* emancipated, his negro boy John, and that
he executors pay the expense of his removal, and for
is reasonable support and schooling, until he is put
o a trade, and when, if he do, he reaches the age of
wenty-one years, they invest and secure, for his
enefit, as they may deem best, the sum of three
housand dollars, to be raised out of the estate: *Held*,
hat such devise constituted a legal trust, which
either contravened the policy of the State at that
ime, nor the present time. *Green Ex'or vs. An-
erson* 655

It was the duty of the qualified executor, to execute
his trust, and his failure to do so, till after John was
wenty-one years of age, and his detention in Georgia,
s a slave, by the executor, did not destroy the trust,
r prevent its execution at a later period. Equity
onsiders that done which ought to be done, and
irects its relief accordingly. *Ibid.*

Slavery having been abolished in Georgia, and free-
om having come to John, when he was not permitted
o go to it, as directed by the will, and promised by
he executor when he assumed the trust, he being
ui juris, with the right to litigate, in the Courts of
his State, may, in his own name, (as he is over
wenty-one years of age), proceed, in a Court of
quity, to compel the execution of the trust, in ac-
ordance with the will, or as nearly so as the
hanged condition of the country will permit, and to
ecover, not only the legacy, as provided by the will,

but such reasonable compensation, for the support and education, which the will gave him, as the Court may find due and unpaid. *Ibid.*

5. While a freedman may, in the Courts of this State, enforce any legal equity which was created in his favor, while a slave, that did not then contravene the policy of the law, he cannot maintain an action for injuries which he may have received, or for wages on account of labor done by him, while he was a slave. *Ibid.*

ENDORSERS. See *Notation.*

EQUITY.

1. When a bank made an assignment of its assets for the benefit of its creditors, and a large portion of the assets was in money, and securities convertible into money, at a market value, and a creditor, nearly twelve months after the assignment, filed a creditor's bill, charging that, six months after the assignment, and again, shortly before the filing of the bill, he had demanded his share of the cash assets from the assignees, and they had refused to pay him, unless he would release the bank from the whole of his claim, and the bill prayed an account: *Held*, that the bill was not demurrable. If there was complication or cause for further delay, it ought to be set up by way of defence; it cannot be assumed. *Dobbins et al., vs. Porter et al.* 167
2. M. purchased of W. a tract of land on time, giving his note for the purchase-money, and taking the vendor's bond for titles, went into possession of the same, made valuable improvements upon the land, and afterwards L., a married woman, purchased the property as her separate estate from M., and paid the original purchase-money to W., the original vendor, who executed a deed to M., and M., the first purchaser of the land, executed a deed to L., the married woman, receiving the sum of \$31,000 00, in Confederate money. Subsequently the land was levied on to satisfy a judgment obtained against M., the first purchaser of the land from W., in favor of H., and was advertised for sale as the property of M. L. filed her bill on the equity side of the Court, enjoining the sale; and praying a perpetual injunction

against the sale thereof, on the ground that, in view of the facts of the case, the land was not subject to be sold in satisfaction of the creditor's judgment. The Court below decreed a perpetual injunction: *Held*, that the judgment of the Court below, perpetually enjoining the judgment creditor, was error; that the Court below, upon the state of facts presented, should have ordered and decreed that the land be sold, and out of the proceeds of such sale, Mrs. L. be first paid the amount of the original purchase money, to which W. would have been entitled under his contract, with interest thereon up to the time of sale, and that the balance of the proceeds of the sale of the land be paid to the judgment creditors of M., according to their legal priority, in existence prior to Mrs. L.'s purchase of the land. *Huie, et al. vs. Loud*..... 101

When a bill was filed to enjoin a writ of possession in an ejectment case, after the judgment therein had been affirmed by the Supreme Court, alleging that the Supreme Court had, in its judgment, mistaken or overlooked material facts in the record: *Held*, that the bill was properly dismissed on demurrer. The judgment of the Supreme Court in a case, is a judgment affirming or reversing the judgment below, and is final and conclusive between the parties on the matters involved on that trial. The opinion of the Court, on the law of the case, does not stand on the same footing, and may be overruled, after argument, if shown to be erroneous, even if unanimous. *Russell vs. Slaton*..... 195

Plaintiff in the Court below sold to defendant four bales of cotton while Confederate money was the currency, and had a market value, and was to receive that currency in payment. Defendants delayed payment till after the Confederate armies had surrendered, when one of them, with knowledge of the surrender, visited the plaintiff at his residence in the country, and paid the debt in Confederate currency, at a time when plaintiff swears he had no knowledge of the surrender: *Held*, that, in such cases, it is a question proper for the jury to determine whether defendant practiced a fraud upon plaintiff, by taking advantage of his ignorance, and misleading him, and inducing him to receive the notes in payment, when defendant knew they were in fact of no value by reason of the failure of the Confederacy. If plaintiff was induced

by fraud to take the notes, and they had ceased to have any market value, when he learned the fact of the surrender, he was not bound to tender them back to defendant to enable him to maintain an action for the amount due him for the cotton. *Blalock et al., vs. Phillips*..... 21E

5. The minor legatees under a will, who are not the children of the testator, have no right in a case pending in Chancery, upon a bill filed by the executor for direction, to an interlocutory order, setting apart money for their support, unless the estate is solvent, and able to pay all just debts, and leave a sufficient fund out of which to pay the sum necessary for their support. And it was error in the Chancellor to grant said order when the solvency of the estate was denied, till it had been ascertained by the report of a Master in Chancery, or in some other legal way, that there would be a fund after the payment of the debts of the estate. *Williams et al., vs. Mobley, Ex'r*..... 2 -

6. Where A purchased lands from B, and took bonds for titles, and went into possession, and the evidence raised a presumption that he paid part of the purchase-money, and A while in possession, sold to C, and received the purchase-money in full, and gave C a bond for titles, and delivered to him the grants from the State to the land, and agreed to deliver the possession at a future day, and A afterward sold the same land to D and A, and D went to B, and paid off the balance of the purchase-money due from A to B, and B made a deed to D, and the jury found that D had notice of the purchase by C when he bought of A: *Held*, that A, by his purchase from B, had an equity, which he could sell to C, and that D having purchased with notice, and having obtained the legal title, held it as a trustee for C, upon the payment to him by C, of the balance of the purchase which he paid to B. *Street et al., vs. Lynch*..... 631

7. When a bill was filed for a new trial, in an action of ejectment, on the ground that the witness by whom the defendant proved adverse possession for the legal period, has since refreshed his recollection, and will now testify that he was mistaken as to the time when the possession commenced, and the bill was dismissed for want of equity, and that judgment was affirmed in this Court; a motion for a new trial, made at a sub-

quent term of the Court in the same case, on the same ground, will not be entertained by the Court. The question is *res adjudicata*. *Baldwin vs. McCrea* 650
Injunction.

EQUITY—PLEADING AND PRACTICE.

The exercise of the discretion of a Chancellor in refusing to appoint a Receiver, will not be controlled except when it is abused. *Reid vs. Beld et al.* 24

A bill filed by the factor, and sanctioned, granting a decree against one charged to have a portion of the crop in possession, as agent of the planter, and requiring him to produce the same, that it may be subjected to the lien, ought not to be discharged on the coming in of the answer, not denying the plaintiff's equity, except on information and belief, even though supported by an affidavit, setting up title in the defendant to the crop, especially when the affidavit does not deny notice of the lien. *Byrd and Coker vs. Johnson and Co., et al.* 113

If the complainant, in a bill in equity, intends to waive the answer of the defendant under oath, he must so state distinctly. The statement that he is unable to prove the allegations in his bill, without the answer of the defendant, is not a compliance with the Code. If complainant waives an answer under oath, the answer filed, is not evidence. It may be used, however, as an admission of record, and complainant is not bound to prove any fact admitted. But when so used, the admission must be taken, together with any qualifications or explanations accompanying it. *Woodward vs. Gates et al.* 205

When A, a warehouseman, files a bill against B and C, partners, also warehousemen, alleging that they, as factors for D, had, in conjunction with D, illegally got possession of certain cotton which had been stored with A by various persons, and had removed it out of this State, to be sold on D's account, and prayed that B and C be enjoined from paying the proceeds to D, and that they be decreed to account to A for the value of the cotton: *Held*, that this is a bill for account, and, that the true owners of the cotton (A's principals) ought to be parties to the bill. *Pierce et al., vs. Bruce & Co.* 444

4. In equity, all parties at interest must be made parties to a bill; if they be within the jurisdiction, and when a bill is filed against two partners, who are both served, and answer, (the bill praying an account for partnership acts,) and one of the partners dies: *Held*, that his personal representatives must be made parties to the bill, unless it affirmatively appears that he died non-resident, and that the estate has no interests in this State. *Ibid.*
5. Mere general charges of fraud, without specification of fraudulent acts, are not sufficient to give a Court of Equity jurisdiction to set aside a sheriff's sale. *Kilgo vs. Castleberry*... 512
6. When A commenced his proceeding against B, under section 4000 of the Code, as an intruder, and B filed a counter-affidavit, which was accepted by the sheriff, and returned to the Superior Court, and an issue was made up, and A afterwards sold the land in dispute to C, who filed a bill against B, which B answered, and set up equities which entitled B to a hearing, and C then moved to dismiss his bill, which was refused by the Court, which judgment was not excepted to; *Held*, that equity having obtained jurisdiction and control of the case, will hold it for adjudication. *Wyley vs. Whitley et al.*... 605

EVIDENCE.

1. In a proceeding to reform a deed, on the grounds of fraud and mistake, the declarations of the grantor, made subsequent to the execution of the deed, and in the absence of the grantee, are not admissible to prove a mistake in the deed, which may be corrected in equity. *Adair, administrator, vs. Adair, executor.* 46
2. Before an instrument can be reformed, it must be shown, by clear and satisfactory evidence, that either by accident, fraud or mistake, the written instrument does not contain and express what the parties intended it should contain and express at the time of its execution. (R.) *Ibid.*
3. Dying declarations of opinions, not facts, are inadmissible as evidence. *Whitley vs. The State*... 50
4. The public laws of the several States of the United States will be judicially recognized by the Courts of this State, when published by authority of the re-

pective States; or may be proved, as required by law, under the great seal of the respective States.

Sims vs. Southern Express Company..... 129

Upon the trial of a defendant who was indicted for burglary under the Code, for breaking and entering a store-house, alleged to be the property of certain parties therein named: *Held*, that *parol* evidence of the fact that the parties named in the indictment were in possession of the store-house under a written contract of lease at the time of the alleged burglary, was sufficient to sustain the allegation of ownership of the premises, in the indictment, without the production of the written contract of lease. *Houston vs. The State*. 165

In an action for waste, a witness should state facts, and while he may give his opinion, accompanied by the facts upon which it is predicated, as to the number of acres from which the timber has been cut, the value of the land before and after it was cut, the whole number of acres in the tract, the proportions of timbered land and the like; it is error in the Court to permit him to give, in evidence, his opinion that the estate of the remainder-man has been damaged a certain amount by the defendant. It is the province of the jury to draw, from the facts stated, their own conclusion, as to the amount of damage, if any, sustained by the plaintiff. *Woodward vs. Gates et al.*..... 205

If complainant waives an answer under oath, the answer filed, is not evidence. It may be used, however, as an admission of record, and complainant is not bound to prove any fact admitted. But when so used, the admission must be taken, together with any qualifications or explanations accompanying it. *Ibid*.

The statute of Gloucester, as to the forfeiture, was not of force in Georgia prior to the adoption of the Code, and it was error in the Court to instruct the jury that they might find a forfeiture of the life-estate upon evidence of acts, most, if not all, of which were done prior to that date. The evidence upon which the forfeiture was claimed should have been confined to acts of waste since 1st January, 1863. *Ibid*.

The stringent rules of the English law, relative to waste, were not applicable to our condition; and were not embraced in our adopting statute. It is not always waste in this State for a tenant-for-life to cut growing timber, or clear land. Regard must be had

to the condition of the premises; and the proper question for the jury to decide, under the instruction of the Court, will be, did good husbandry require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed? *Ibid.*

10. When a *feme sole* gave her note for \$50 00, and afterwards married in 1862, before the adoption of the Code, her husband receiving through the wife property more than sufficient to pay the debt, and the husband died before any judgment was obtained against him for the debt of the wife: *Holt*, that as the parties were married before the adoption of the Code, the husband was liable for the debts of his wife only to the extent of the property received through her, when judgment was recovered against him therefor during the coverture. The will was competent evidence for the purpose of shewing, that the parties were married prior to the adoption of the Code in 1863, as it was dated 31st July, 1862, and recognized therein the maker of the note to be his wife at that time. *Bryan et al., vs. Doolittle*.....

11. Under the Scaling Ordinance of 1865, the parties to contracts made between 1st June, 1861, and 1st June, 1865, have the right to give in evidence to the jury the consideration of the contract, and the value thereof, at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time, and the verdict and judgment rendered shall be on principles of equity. *Hugh vs. McHugh*.....

12. The opinion of one, who for many years has been a railroad superintendent, in a matter within the scope of his employment, stands upon the footing of the opinion of an expert; but he cannot give his opinions of the object of a railroad company, with which he had no connection, in putting up a particular notice on the doors of its cars. Though opinions are not generally evidence, yet, when the truth sought to be ascertained is matter of opinion, a witness, not an expert, may give his opinion, if he states the facts upon which it is based. *M. & W. R. R. & Co. vs. Johnson*..... 409

13. A card published by the passengers immediately

ter a railroad collision, is not evidence, as part of the *res gestæ*. *Ibid.*

Receipts for money are always only *prima facie* evidence of payment, and may be denied or explained by parol. *Dunnagan et al., vs. Dunnagan et al.*..... 552

When, in the submission of the law and the facts of case to the Judge, it was agreed that, if the Judge could have any doubts upon a question of fact, he could submit it to a special jury, and on the trial there arose a question of notice to a bank, and it was proven that the fact was advertised in two daily papers taken at the bank, was known to one of its directors, published in a large printed card and circulated among the business men of the community, and painted in large letters on the walls of the store in which the goods, about which the dispute arose, were kept: *Held*, that although the cashier and president of the bank and one of the clerks denied the notice, and witnesses, the Judge might well fail to have such doubts as would require him to call in the jury. *The 1st Nat. Bank of Macon vs. Nelson and Co.*..... 399

A deed unrecorded cannot be given in evidence as color of title without proof of execution. *Hightower, tenant, vs. Williams et al.*..... 597

A grant issued to Isaac O. Holland, orphan. It appeared by parol that there was no such person as Isaac O. Holland, orphan, in the district at the time of giving in for draws, but that Isaac O. Holland's orphan, Mary Holland, was in the district and did give in for a draw: *Held*, that parol evidence of these facts, may be given to the jury, not to prove a mistake in the name of the grantee, but to give effect to the grant, by identifying the person intended as the grantee. *Tuggle and wife vs. McMath et al.*..... 648

REPTIONS.—R. 28.

“ to security on appeal. R. 1.

“ to claim bond, etc. R. 15.

“ to interrogatories. R. 37.

EXECUTORS DE SÖN TORT.

The heirs-at-law of an estate may, as between themselves, divide the estate by agreement, without administration, but as against creditors, if they convert to

their own use the personal effects, they are executors *de son tort*, and are liable as such. *Barron vs. Barney et al.*..... 24

2. Although, under the Code, executors *de son tort* cannot get credit for any debt they may have paid, yet, if, in good faith, they have furnished the widow her year's support, according to her circumstances in life, and this has exhausted the effects they have used, they are not liable, except for the excess. The claim of the widow is not a debt, but a special provision allowed by law, in preference to any liens or debts held by creditors. *Ibid.*

3. There being, in this case, no evidence of the actual payment, by these heirs, of the widow's year's support; we reverse the judgment of the Court below in refusing to grant a new trial. *Ibid.*

Executor denying debt, etc., R...... 29

EXEMPTION FROM DEBTS.

See Husband and Wife, 2.

EXHIBITS. *See E. R., 4.*

EXPLANATION OF WRITINGS.

See Evidence, 14, 17.

EXPRESS COMPANIES. *See Omnion-Carrier.*

FEEES.

A witness for the State, in a criminal case, who, in obedience to a *subpoena* served upon him while temporarily in this State, actually comes from his home, in a distant State, where he resided when the *subpoena* was served upon him, and testifies in the cause, is entitled to mileage from the county treasury, for the whole distance travelled in coming from and returning to his home. *Dutcher vs. J. J. Fulton Co.* 214

FEME. *See Husband and Wife.*

FOREIGN LAWS. *See Evidence, 4.*

FORMS.

Attorney's license and affidavit, R. 2, and R. S., C. 1:
 affidavit to plea. R. 24.
 affidavit as to lost papers. R. 42.
 commission for interrogatories. R. 32.
 affidavit to answer. E. R. 2.
 judgment. R. 38.

FORMA PAUPERIS—*Appeal in.* R. 1.

FRAUD.

Confederate Currency, 1.
Equity, 4.
Equity Pleading and Practice, 5.
Arbitration, 1.
Laches, 2.

FREEDMEN. See *Emancipation*.

GARNISHMENT.

A bona fide purchaser, for value, of a negotiable promissory note before due, has a right to collect the amount thereof, notwithstanding the maker had been served with a summons of garnishment, requiring him to answer what he was indebted to the payee, who was the owner of it at the time of the service of the summons. In such a case the rights of the purchaser are paramount to those of the garnishment creditor. *Time et al., vs. West*..... 18

The doctrine of *lis pendens* does not apply to negotiable securities not due. *Ibid.*

Where the Court below ordered a garnishee to perfect an answer to which exceptions had been filed, and the garnishee neglected to answer until the garnishment was called, on the motion docket, at the next term after the order had been passed, and even then, though present in Court, insisted on leave to answer at an adjourned term, which the Court had determined to hold, and the Court permitted the plaintiff to enter a judgment against the garnishee: *Held*, that this Court will not control the discretion of the Judge below, in refusing, at the adjourned term, to set aside the judgment, and permit the garnishee to answer. *Harris vs. Breed & Co.* 297

4. When a *fi. fa.* against two joint obligors, mutually interested in the consideration, is satisfied by the sale of the property of one of them, the other is indebted to him for contribution according to the equitable rights of the two in the original contract, and the creditors of the obligor whose property has been sold, may reach this obligation to contribute, by process of garnishment, and have, therefore, a remedy at law. *Kilgo vs. Castleberry*..... 512
5. When A sold to B. a stock of merchandize, in consideration that B would pay a certain debt of \$500, due by A, to which B was security, and in further consideration that B would pay the debts due by A for the stock of goods, which amounted to \$1,500 00: *Held*, that the mode of payment was a part of the consideration, and that even as to the \$1,500 00, A has no right of action against B until he fails or unreasonably delays to pay the debts due by A for the stock of goods. *Watkins vs. Pope*..... 514
6. Nor can a general creditor of A, in the absence of any fraud or collusion between parties, with intent to hinder or defraud the creditors of A, subject by the process of garnishment, this obligation of B to the payment of the debt the creditor holds against A. In such a case A's general creditors may, by garnishment, place themselves in A's place, with all his rights against B, with the additional advantage that they are not estopped by A's own fraud, if there be any, and if B has refused, or unreasonably delayed to pay the stock-debts, or has failed to perform his contract with A, they may recover. *Ibid.*
7. When a case of garnishment is called in its order on the docket, at the second term of the Court, after the service of the summons of garnishment, and after final judgment against the defendant, and the garnishee has failed to answer, and the Court allows judgment to be entered against the garnishee, this Court will not control the discretion of the Court below, (unless in extraordinary cases,) in refusing to set aside such judgment after it is signed, to allow the garnishee to answer. *Emanuel vs. Smith & Richmond*..... 603
8. It is the duty of the Court, if the final judgment has not been rendered against the defendant at common law, or in attachment, to continue the case against

the garnishee till after the rendition of such judgments. *Ibid.*

GLOUSTER—STATUTE OF. See *Waste* 2, 3.

GRANT.

Grant explained by parol. See *Evidence*, 17.

HEARSAY. See *Evidence*, 1, 3, 13.

HUSBAND AND WIFE.

1. When a *feme sole* gave her note for \$50 00, and afterwards married in 1862, before the adoption of the Code, her husband receiving through the wife, property more than sufficient to pay the debt, and the husband died before any judgment was obtained against him for the debt of the wife: *Held*, that as the parties were married before the adoption of the Code, the husband was liable for the debts of his wife *only* to the extent of the property received through her, when the judgment was recovered against him therefor *during the coverture*. *Bryan vs. Doolittle*..... 255

2. Real estate in the town of Monticello, was sold at sheriff's sale, as the property of an insolvent debtor: *Held*, that the wife of the defendant in *fi. fa.* is entitled, under the 2013 and 2017 sections of the Code, to have \$500 00 of the proceeds of the sale, set apart and invested in a home for herself and family, against a pre-existing creditor. *Maxey Jordan & Co., vs. Loyal et al.*..... 531

When land was sold under a judgment obtained in 1861, the wife could claim no more of the proceeds as exempt, from payment of her husband's debts than was then exempt by law. WARNER, J., dissenting. *Ibid.*

See *Dower*.
See *Widow*.

HYPOTHETICAL CHARGE.

See *Charge of the Court*, 1.

ILLEGAL CONTRACTS.

See *Confederate Currency*, 5, 6.
See *Contracts*, 2.

ILLEGALITY. R, 80 and 31.

IMPAIRING CONTRACTS.

See Constitutional Laws.

INFANTS. See Minors.

INFORMATION AND BELIEF.

See Equity Pleading and Practice, 2.

INJUNCTION.

1. As a general rule this Court will not control the discretion of the Court below in dissolving an injunction, unless there appears to have been an abuse of that discretion in the violation of the principles of law or equity applicable to the facts in the case. *S. & O. Canal Co. vs. Ryan et al.*.....
2. Bills for a new trial, and to restrain a judgment at law, are not favored by Courts of Equity. In order to obtain the assistance of the Court in such cases, the complainant must shew *full diligence*, unmixed with negligence, on his part. *Robuck & Orr vs. Harkins et al.*.....
3. When an action was pending in Bibb Superior Court, in favor of a plaintiff, who resided in Wilkerson county, and the defendant filed a bill in Bibb, charging that the note sued on was given for two hundred and fifty bales of cotton, which the plaintiff had, by fraud and deceit, induced him to buy, but which, the day after the sale, was seized by the military authorities as Confederate cotton, and, by them sent out of the State, against the complainant's consent and efforts, but which he had followed to New York, and brought his action therefor in the United States Court, and had given notice of the action, which was still pending, to the vendor, and the bill prayed an injunction of the common law suit until the termination of the suit in New York: *Held*, that the bill was properly filed. In such a case the Judge may grant a temporary injunction, leaving to the defendant his right to answer, and move to dissolve, and to have such other proceedings taken are as usual in Chancery. *Carwell vs. The M. Manufacturing Co.*.....

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Where a plaintiff in *fi. fa.* had a lot of cotton, mules, etc., levied upon, and pending the levy, it was agreed between him and the defendant, that he should release the property from the levy and return it to the defendant, and should enter the execution fully satisfied, in consideration, that defendant would convey to him a tract of land, with certain personal property, in payment of the *fi. fa.*, and in compliance with said agreement, plaintiff released and restored the property levied upon, which was sufficient to have satisfied the *fi. fa.*, to the defendant, and the defendant delivered to the plaintiff possession of the land and personal property, and turned over to him the title papers, and was to make him a deed as soon as they could get it drawn, and defendant died soon after, without making the deed, and his widow, who was admitted to be insolvent, after the end of the year, finding the premises vacant, took possession, claiming the land for her husband's estate, and commenced proceedings in the Superior Court to have her dower allowed out of the same, there being no legal representative of her husband's estate, and plaintiff filed his bill alleging these facts, and praying that she be restrained from trespassing upon the land, and from prosecuting her action for dower, until a legal representative of the estate was appointed: *Held*, that it was not error in the Judge who granted the injunction to overrule a motion to dissolve it, and to hold it up, until the hearing of the bill, placing his decision on the ground of restraining the trespass alone. *Webb et al. vs. Harp* 641

An injunction will not be granted for fraud, unless the bill sets forth the specific acts of fraud upon which it is sought; a general allegation of fraud is insufficient. *Powell vs. Parker et al.*..... 644

An injunction will not be granted to restrain the sale, by defendant, of his railroad stock, and the drawing of the dividends by him, on the ground that complainant holds his covenant of warranty of title to a lot of land, the title of which is in dispute, in an action of ejectment, when the bill shows that the railroad stock and other property of the defendant, is of much greater value, than the sum for which he may become liable on his warranty, and there is no charge that he is beyond the jurisdiction of the Court, or

that he is insolvent, and when no other sufficient equitable ground is stated in the bill. *Ibid.*

7. When the Chancellor, on the bill being presented to him, ordered that the defendants show cause on a day mentioned, why an injunction should not be granted, that *in the meantime* the defendants be enjoined, till the further order of the Court, and on the hearing, the Judge refused the injunction: *Held*, that the temporary injunction expired of its own limitation when the injunction was refused at the hearing, and that no vitality could be given to it pending the proceedings in this Court, by bond given by complainant, which is claimed to operate as a *supersedeas* of the judgment refusing the injunction. *Ibid.*

See *Jurisdiction of Superior Court*, 2.

See *E. R.*, 1.

INSANITY.—See *Criminal Law*.

INSOLVENT DEBTORS.

Under the law, as it now stands in this State, an insolvent debtor may make an assignment of his property in trust, *bona fide*, for the benefit of one or more creditors, to the exclusion of others: *Provided*, no trust or benefit is reserved to the assignor, or any person for him. *Embry and Fisher vs. Clapp*..... 245

See *Husband and Wife*.

INSURRECTION. See *Criminal Law*, 16.

INTERROGATORIES. R. 32 to 37 inclusive.

INTERRUPTION OF COUNSEL. R. 4.

INTRUDERS.

1. A Justice of the Inferior Court, on the 26th day of October, 1867, had authority, under the law, to administer an oath for the removal of intruders upon land. *Collins vs. Rutherford et al*..... 29
2. The counter-affidavit of the party in possession must state that he does, in good faith, claim a *legal* right to the possession of the land. *Ibid.*
3. When the affidavit of the party in possession is dis-

missed for being in compliance with the law, he will not be permitted to file a second affidavit at the Court, the Code requiring that he shall *at once* tender to the sheriff the proper affidavit. *Ibid.*

Under section 4005 of the Revised Code, the administrator of the deceased landlord may make the affidavit and institute the proceedings to dispossess a tenant who holds over. *Moody et al., vs. Ronaldson.* 652

When the affidavit is made by the administrator, a counter-affidavit filed by the tenant, that he does not hold the premises either by lease, rent, at will, by sufferance, or otherwise, from said Ronaldson (the administrator) or from any one *under whom he claims the premises*, or from any one claiming the premises under him, is a sufficient compliance with the statute, and it was error in the Court to refuse to allow the issue thus presented to be submitted to a jury, and to order the sheriff to proceed to dispossess the tenant. *Ibid.*

JOINT OBLIGORS.

When an execution against two joint obligors is levied upon the property of one of them, the other defendant has a right to buy the property at the sale, and he gets the full title of his co-defendant to the property. *Kilgo vs. Castleberry* 512

When a *fi. fa.* against two joint obligors, mutually interested in the consideration, is satisfied by the sale of the property of one of them, the other is indebted to him for contribution according to the equitable rights of the two in the original contract, and the creditors of the obligor whose property has been sold, may reach this obligation to contribute, by process of garnishment, and have, therefore, a remedy at law. *Ibid.*

JUDGMENTS—HOW VACATED.

Under the 6th section of the 11th article of the Constitution, motions for new trials, bills of review, or other proceeding, to vacate judgments, orders or decrees, made since the 19th of January, 1861, must be for *fraud*, illegality, or error of law. That section does not relieve one who was cast in his suit, or lost his rights by his own negligence. *Miller vs. Mitchell, Reed & Co.* 312

JUDGMENT BY DEFAULT. *R.*, 28 and 39.

JUDGMENTS OF SUPREME COURT.

See *Decisions of Supreme Court*.

JURISDICTION OF COUNTY COURTS.

Since the organization of the County Court, that Court and not the Inferior Court, according to the provisions of Irwin's New Code, had jurisdiction to hear and determine the question of the abatement of a nuisance, caused by a mill-dam, on the 27th December, 1867. *Barrett, Adm'r, vs. Jackson, et al.*..... 181

JURIES—Time allowed for striking, *R.*, 41.
Misconduct of. See *New Trial*, 5.

JURISDICTION OF SUPERIOR COURTS.

1. Where A. bargained to B. certain slaves, which at the time were runaway, and B. paid to A. the price agreed upon, and it was agreed, at the time, between the parties, that if B. did not, by a certain fixed time, get possession of the slaves, A. should repay the money: *Held*, that this was only a conditional sale, and if B. failed to get the negroes, there was no sale, and A. holds the money for B.'s use, and B. may recover it, and it is not a debt, the consideration of which is a slave or slaves. *Kimbrough vs. Worrill*... 119
2. The Constitutions of 1861, 1865, and 1868, requiring cases in equity to be brought in the county where one of the defendants, against whom substantial relief is prayed, resides, does not apply to bills ancillary to suits already pending, which for purposes of injunction, etc., may be brought in the county where such suits at law or equity are pending. When, however, the bill prays independent relief, not necessary to an adjudication of the matter involved in the original suits, the bill, as to that independent relief, is demurrable. *Carswell vs. The Macon Manufacturing Co.*..... 403

JURY.

1. When negroes were, as *tales* jurors, put upon the prisoner, and he challenged the array, and, by consent,

the negroes were put off the jury, and the prisoner made no further objection to the panel, his challenge to the array was waived. *Whitley vs. The State*....., 50

The conduct of certain jurors, who, while they were charged with the case, conversed with a person not on the jury, in presence of a number of others, about the case, and used expressions favorable to the right of the plaintiff to recover, assigning as a reason that defendant, sworn as a witness, had contradicted himself, when in fact he had not, is highly reprehensible, and a new trial should have been granted by the Court below on that account. Jurors should speak to no one, nor permit any one to speak to them, about the case, while charged with its consideration. *Blalock et al. vs. Phillips*..... 216

The jury, in a murder case, have no right, in this state, authoritatively to recommend, in lieu of the death penalty, imprisonment for life, except in cases where the conviction is founded solely on circumstantial evidence, and it is no ground for a new trial that the Judge in this case said to the jury, "if there are mitigating circumstances, or good legal reasons, you may so recommend." *Long vs. The State*....., 491

Y—how stricken, *H.*, 41

JUSTICE OF THE INFERIOR COURT.

Justice of the Inferior Court, on the 26th day of October, 1867, had authority, under the law, to administer an oath for the removal of an intruder on land. *Collins vs. Butherford et al.*..... 29

JUSTICES OF THE PEACE.

as to returning papers..... 40

KING'S ENEMY. See *Common-Carriers*.

LACHES.

When a party did not enter an equal appeal within the time prescribed by law, and has otherwise been guilty of negligence, a new trial will not be granted on account of newly discovered evidence; more especially when the evidence is cumulative, and one of the witnesses, of whom the discovery is alleged to

have been made, gave evidence on the trial, and the other was a clerk of the party moving for the new trial, at the time of the transaction, and the motion is not made until more than twelve months after the rendition of judgment. *Miller vs. Mitchell, Reed & Co.* 312

2. Under the 6th section of the 11th article of the Constitution, motions for new trials, bills of review, or other proceeding, to vacate judgments, orders or decrees, made since the 19th of January, 1861, must be for *fraud*, illegality, or error of law. That section does not relieve one who was cast in his suit, or lost his rights by his own negligence. *Ibid.*

See *New Trial*, 4.

LANDLORD AND TENANT.

1. Two parties rented a store-house for one year, from 24th November, 1867, the rent to be paid quarterly, and soon after dissolved the partnership, and one of them continued the business on his own account for a time and died. His administrator obtained an order from the Court of Ordinary, authorizing him to continue the business for the balance of the year, for the benefit of the estate. The widow applied for the year's support, allowed by law, for herself and children, and the appraisers allowed her \$2,700, which was made the judgment of the Court of Ordinary, and which left the estate insolvent. The other partner was also insolvent. The landlord filed a bill, praying an injunction against the administrator, to restrain him from turning over the estate to the widow, or otherwise disposing of the same till his note was paid: *Held*, that the dissolution of the firm did not affect the rights of the landlord, as a tenant can not, under our statute, transfer his lease without the consent of the landlord; and the lease, so far as the landlord's rights were concerned, remained partnership property, and forms no part of the estate of the deceased partner till the rent is paid, and that the landlord is entitled to his rent out of the proceeds of the business done in the house, or the stock in trade, for the time the administrator used the premises, before the estate is turned over to the widow of the deceased. *Boone vs. Sirrine, adm'r.* 121
2. A tenant has no right to sub-let the premises without the consent of the landlord, and when done with his

onsent, the sub-tenant is the tenant of the landlord, and he, and not the tenant, has a right to proceed against the sub-tenant, in case he holds over. *McBarney vs. McIntyre*..... 261

When A., the tenant, sub-let to B., who was also required to pay rent to the landlord for the part sublet, and at the end of the year for which they held the premises, A. and B. were rivals in securing a lease from the landlord for the ensuing year, and both claimed to have rented the premises for the next year, and B. remained in possession, the relation of landlord and tenant did not exist between them. *ibid.*

When A. applied to the landlord to lease the premises for three years, which was refused, but it was agreed that he might rent for one year, and that the written lease should be executed at another time, and A. laid down his notes for one year's rent on the landlord's table, which A. afterwards claimed as the evidence of the contract, the notes not having been returned: *Held*, that the language used in the notes must be taken most strongly against A., and that the expression in the notes that they are for the rent of the store occupied by A., will not embrace a lot adjoining the store-house, fenced off to itself, which usually went with the store before it was so fenced. *ibid.*

A landlord who had leased premises to a tenant is not liable for a nuisance maintained upon the premises, by the tenant, during the lease. If the nuisance existed upon the premises when the lease was made, the landlord is liable. But if the tenant continues the nuisance after he obtains exclusive possession and control, he alone is liable for its continuance. As the landlord, under our statute, is liable for necessary repairs on the premises, if the nuisance grows out of his neglect to make the repairs, the tenant may make them, and set off their reasonable value against the rent due the landlord. *Vason vs. The City of Augusta*. 542

Under section 4005 of the Revised Code, the administrator of the deceased landlord may make the affidavit and institute the proceedings to dispossess a tenant who holds over. *Moody et al., vs. Ronaldson*.. 652

When the affidavit is made by the administrator, a counter-affidavit filed by the tenant, that he does not

hold the premises either by lease, rent, at will, by sufferance, or otherwise, from said Ronaldson, (the administrator) or from any one *under whom he claims the premises*, or from any one claiming the premises under him, is a sufficient compliance with the statute, and it was error in the Court to refuse to allow the issue thus presented to be submitted to a jury, and to order the sheriff to proceed to dispossess the tenant. *Ibid.*

LEGACY.

See *Abatement of Legacies.*

See *Ademption of Legacies.*

See *Dower.*

LEX LOCI.

See *Liens, 2.*

See *Emancipation, 1.*

LIENS.

1. When the husband of a married woman died seized and possessed of a tract of land, having the legal title thereto, the widow is entitled, under the provisions of the Code, to her dower therein; and the vendor's *equitable* lien for part of the unpaid purchase-money, which was not enforced during the lifetime of the husband, will not override or defeat the widow's *legal* right to her dower in the land. HARRIS, J., dissenting. *Clements vs. Bostwick et al.*..... 1
2. Debts due by a deceased executor, administrator, guardian or trustee, entitled to priority of payment, in the administration of assets, as provided by the Code, section 2312, and paragraph 4 of section 2494, are such only as may be due by persons appointed by the laws of this State. Trustees appointed in other States are not embraced. Debts due by foreign executors, trustees, etc., are to be paid, according to their character, as bonds or accounts, etc., the same as if owing by others, without any priority on account of such character. HARRIS, J., dissenting. *Caruthers and wife vs. Corbin, executor, et al.*..... 75
3. A contract between a factor or commission merchant and a planter, creating a lien upon the crop of the

latter, for provisions furnished to make it, is not required, by the Act of 15th December, 1866, to be in writing. The lien is a good one, between the parties and their agents and purchasers with notice, though it be only in parol. *Byrd & Coker vs. Johnson & Co. et al.*..... 113

Two parties rented a store-house for one year, from 24th November, 1867, the rent to be paid quarterly, and soon after dissolved partnership, and one of them continued the business on his own account for a time and died. His administrator obtained an order from the Court of Ordinary, authorizing him to continue the business for the balance of the year, for the benefit of the estate. The widow applied for the year's support, allowed by law for herself and children, and the appraisers allowed her \$2,700 00, which was made the judgment of the Court of Ordinary, and which left the estate insolvent. The other partner was also insolvent. The landlord filed a bill, praying an injunction against the administrator, to restrain him from turning over the estate to the widow, or otherwise disposing of the same till his note was paid: *Held*, that the dissolution of the firm did not affect the rights of the landlord, as a tenant can not, under our statute, transfer his lease without the consent of the landlord; and the lease, so far as the landlord's rights were concerned, remained partnership property, and forms no part of the estate of the deceased partner till the rent is paid, and that the landlord is entitled to his rent out of the proceeds of the business done in the house, or the stock in trade, for the time the administrator used the premises, before the estate is turned over to the widow of the deceased. *Boone vs. Strrine, administrator*..... 121

Both plaintiff and defendants in error had issued detachments against Joseph A. Crew, and each had served J. Sibley & Sons with summons of garnishment. The garnishment in favor of Bruce & Co. was first served. Bruce & Co., after Murphy had obtained judgment on his attachment, dismissed their attachment in vacation. At the next term of the Court, they were permitted, with the consent of the defendant in attachment, to reinstate their case: *Held*, that they lost their priority over Murphy by dismissing the attachment, and that they could not regain it by reinstating their case. *Murphy vs. Crew et al.*..... 139

6. The Western and Atlantic Railroad is the property of the State, and its incomes are part of the revenue of the State. A debt due the road is a debt due the public, and is to be paid before "any other debt, lien or claim whatsoever," except funeral expenses, etc., as specified by the Code. *The State vs. Dickson* 171
7. M. purchased of W. a tract of land on time, giving his note for the purchase-money, and taking the vendor's bond for titles, went into the possession of the same, made valuable improvements upon the land, and afterwards L., a married woman, purchased the property as her separate estate from M., and paid the original purchase-money to W., the original vendor, who executed a deed to M., and M., the first purchaser of the land, executed a deed to L., the married woman, receiving the sum of \$31,000 00, in Confederate currency. Subsequently the land was levied on to satisfy a judgment obtained against M., the first purchaser of the land from W., in favor of H., and was advertised for sale as the property of M. L. filed her bill on the equity side of the Court, enjoining the sale, and praying a perpetual injunction against the sale thereof, on the ground that, in view of the facts of the case, the land was not subject to be sold in satisfaction of the creditor's judgment. The Court below decreed a perpetual injunction: *Held*, that the judgment of the Court below, perpetually enjoining the judgment creditor, was error; that the Court below, upon the state of facts presented, should have ordered and decreed that the land be sold, and out of the proceeds of the such sale Mrs. L. be first paid the amount of the original purchase-money, to which W. would have been entitled under his contract, with interest thereon up to the time of sale, and that the balance of the proceeds of the sale of the land be paid to the judgment creditors of M., according to their legal priority in existence prior to Mrs. L.'s purchase of the land. *Huie et al., vs. Loud* 191
8. Although, under the Code, executors *de son tort* can not get credit for any debt they may have paid, yet, if, in good faith, they have furnished the widow her year's support, according to her circumstances in life, and this has exhausted the effects they have used, they are not liable, except for the excess. The claim of the widow is not a debt, but a special provision

allowed by law, in preference to any liens or debts held by creditors. *Barron vs. Burney et al.*..... 264

LIMITATION OF ACTIONS.

1. The Act of the Legislature of 1861, and the Ordinance of the Convention of 1865, *suspending* the running of the Statute of Limitations in this State, are recognized, and made valid by the *express* provisions of the Constitution of 1868. *Ryan, executor, et al., vs. Banks*..... 300
2. An endorsement of a promissory note past due; for a valuable consideration, is a new contract, and the Statute of Limitations begins to run in favor of the endorser only from the date of the endorsement. BROWN, C. J. *Ibid.*
3. The Statute of Limitations was legally suspended for one year by the Act of December, 1860. BROWN, C. J. *Ibid.*
4. The Ordinance of the Convention, passed 1st November, 1865, declaring the Statute of Limitations, in all cases, civil and criminal, *to be and to have been* suspended from the 19th of January, 1861, and that it shall so continue until civil government is fully restored, or until the Legislature shall otherwise direct, has been legalized by the new Constitution, and the Ordinance of the Convention of 1868, so far as it does not divest vested rights. This made it valid, so far as it was prospective, but whether it could restore to plaintiff a right of action lost by the running of the statute for the *full period* prescribed by law before it passed, *quere.* BROWN, C. J. *Ibid.*
5. Since the 1st of January, 1863, the time when the Code went into operation, there has not been any Statute of Limitations in this State, as to suits for real property. An actual adverse possession, under written evidence of title, for seven years, gives a good prescriptive right, as against all persons not under disability to sue. *Pollard, tenant, vs. Tait, executor*... 439
6. The Ordinance of the Convention of 1865, declaratory of the suspension of the Statutes of Limitations since the 19th of January, 1861, and enacting that they should continue suspended until civil government should be fully restored, inasmuch as it creates no *disability* to sue, did not operate so as to prevent the

ripening of a prescriptive title under the Code, so far as that title is dependent on a possession since the 1st of January, 1863. *Ibid.*

7. A party setting up a prescriptive right under the Code, may tack to his possession, since the 1st of January, 1863, a possession, good before that time, as part of a defense under the Statute of Limitations, if his possession has been continuous. *Ibid.*
8. When a new lessor of the plaintiff is introduced, by way of amendment to an action of ejectment, the case, as to that demise, is to be tried as though the action had not been commenced until the date of the amendment. *Ibid.*

LIS PENDENS.

The doctrine of *lis pendens* does not apply to negotiable securities not due. *Mims et al., vs. West*..... 18

LOSS OF PROPERTY.

As a defense, see *Constitutional Laws*.

LOST PAPERS. R., 42 and 43.

MANDAMUS.

1. When an attachment was levied upon fifty shares of capital stock of a corporate company, and sold at sheriff's sale, it was the duty of the sheriff to give a certificate of purchase to the highest bidder, and on presentation of such certificate to the proper officer of the corporation, it was his duty to make the necessary transfer of the stock to the purchaser on the books of the company. In such case, the sheriff does not put the purchaser in possession, but the proper officer of the corporation is, *pro hac vice*, a public officer under the Code, charged with that duty, and if he refuses to do it, *mandamus* is the proper proceeding to compel its performance. *Bailey vs. Strohecker*..... 259
2. Where a corporator has a clear legal right, which has been violated by the corporation, and he has no other adequate legal remedy, he is entitled to relief by *mandamus*. *Waring vs. The Georgia Medical Society*..... 608
3. The record in this case shows that the society censured Dr. Waring for doing that which the law not only

authorizes but encourages, and the return to the *mandamus nisi* shows no sufficient cause for his expulsion. He is, therefore, entitled to a peremptory *mandamus* commanding and compelling the society to restore him to all his rights and privileges as a corporator. *Ibid.*

MEASURE OF DAMAGES.

The plaintiff, in this case, waives the tort committed by the defendants in forcibly taking the cotton from his gin house, by the form of action brought; and can only proceed for the price of the cotton. *Blalock et al., vs. Phillips*..... 216

If a passenger on a railroad be injured by a collision of the trains, and the evidence shows that, though the company (or its agents), was guilty of negligence, yet the party injured could, by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company. *M. & W. R. R. Co. vs. Johnson*..... 409

If, in such a case, it appears that both the defendant and the plaintiff were guilty of negligence, and it does not further appear, from the evidence, that the deceased could, at the time of the injury, have avoided the consequences to himself of the negligence of the railroad company, or its agents, he is entitled to recover; but it is the duty of the jury to lessen the amount of their verdict in proportion to the negligence and want of ordinary care of the passenger. *Ibid.*

Where a suit is brought by a widow, for the homicide of her husband, under the 2920th section of Irwin's Code, and there is no fault proven on the part of the deceased, the rule to be adopted for estimating the damages, is: The pecuniary damages to the wife from the homicide, to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably be expected to exist in view of his character, habits, occupation, and prospects in life, and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectation of the life of the deceased, as ascer-

tained by the mortuary tables of well established reputation. *Ibid.*

5. In this case, the Court feels constrained to reverse the judgment of the Court below, overruling the motion for a new trial, made by the plaintiff in error, on the ground that the Court erred in its charge to the jury, as to the rule for estimating damages in such cases, and on the further ground, that the verdict of the jury was decidedly against the weight of evidence, if not as to the absence of ordinary diligence on the part of the deceased, to escape the consequences to himself from the plaintiff's negligence, certainly as to the amount of damages, in view of the rule that where both parties are at fault, the damages are to be diminished in proportion to the negligence and want of ordinary care of the party injured. *Ibid.*

MILITARY ORDERS.

There is nothing in any law of this State or in any order of the military commander, while the State was under military government, which authorizes the Court to pay money raised at sheriff's sale, on the first Tuesday in January, 1868, to the defendant *in fi. fa.*, while there are judgment creditors claiming it. *Battle vs. Battle et al.* 240

MINOR.

1. When a father authorized a merchant to let his daughter, who was a minor, have whatever she wanted out of his store, and the merchant permitted her to purchase various articles, such as were usually kept for sale by the merchant, the father is liable for the goods purchased, though they be neither necessities nor such goods only as a prudent father would furnish a minor child. *Harper & Ammons vs. Lemon, executor.* 227
2. The minor legatees under a will, who are not the children of the testator, have no right, in a case pending in Chancery, upon a bill filed by the executor, for direction, to an interlocutory order, setting apart money for their support, unless the estate is solvent, and able to pay all just debts, and leave a sufficient fund, out of which to pay the sum necessary for their support. And it was error in the Chancellor to grant said order, when the solvency of the estate was denied,

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till it had been ascertained by the report of a Master in Chancery, or in some other legal way, that there would be a fund after the payment of the debts of the estate. *Williams et al., vs. Mobley, executor*..... 241

MINUTES OF COURT.

is the duty of the Clerk to transcribe on the minutes, each day, all the entries on the Judge's docket showing action in a cause, when that action does not otherwise appear on the minutes. *Pearce et al., vs. Bruce & Co*..... 444

MISNOMER.

Where two persons were indicted for a riot, under the 4441st section of the Code, and the name of one of the defendants was spelt Land, in one part of the indictment, and Lance, in another part of it: *Held*, that upon the trial of one of the defendants separately, although the evidence showed that the name of his confederate was Lance, yet, there being no doubt as to the identity of the man, whether he was called by the one name or the other, conviction was right under the facts of the case. *Davenport vs. The State*..... 184

When a bill was filed against a partnership, and after both had answered, one of the firm dies, it is not error to permit, before parties are made, an amendment, correcting a misnomer in the name of a deceased partner. *Pearce et al., vs. Bruce & Co*..... 444

MISREPRESENTATION.

e *Equity*, 4.
e *Promissory Notes*, 6 and 7.

MISTAKE.

e *Equity*, 3, 7.
' *Arbitration*, 1.
' *Evidence*, 1.
' *Ademption of Legacies*, 3.
' *Decisions of the Supreme Court*, 1.

MORTGAGE.

An agent for the sale of goods cannot, as against the owner, pledge or mortgage them to a third party, to secure advances made on his own account. *The First National Bank of Macon vs. Nelson & Co.*..... 391

MOTIONS. *R.*, 44, 45, 46, and *R. S. C.*, 23.

MUNICIPAL CORPORATIONS.

1. A municipal corporation, the owner of a market, the stalls of which it rents, is bound to keep the pavement in front of the stalls in a safe condition, and if a citizen of the corporation is injured through neglect of this duty, by the officers of the corporation, the corporation is liable to the extent of the injury received. *Mayor and Aldermen of Savannah vs. Cullins and wife.*..... 334
2. Any person who shall erect or continue, after notice to abate, any nuisance, which tends to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, is liable to indictment under the Penal Code of this State. The legal offence of continuing a nuisance is not complete before notice to abate. And until the notice is given, and the legal offence is complete, the city authorities have power, as a police regulation, to punish for the continuance of such nuisance, as would subject the offender to indictment after notice to abate. But when the offence against the Penal Code is complete, they have only the power to bind over the offender to the proper court, to answer for the offence. *Vason vs. The City of Augusta.*..... 542

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NECESSARIES. See *Minors*.

NE EXEAT REGNO.

See *Equity Pleadings and Practice*, 2.

NEGLIGENCE. See *Laches*.

NEGROES.

jurors. See *Criminal Law*, 2.
 as by. See *Emancipation*.

NEW TRIAL.

When the charge of the Court assumes certain things of fact, and is in such shape as to intimate to the jury what the Judge believes the evidence to be, and that they made defendant guilty, a new trial will be granted. *Whitley vs. The State*..... 50

In cases which arise under the Scaling Ordinance of 1865, the general rule of this Court is not to disturb the verdicts of juries, unless the same are contrary to law, or manifestly against the weight of the evidence, or contrary to the principles of equity, as regulated by law. *Lazenby, Adm'r, vs. Wilson*..... 124

This Court will not, as a general rule, control the discretion of the Court below in granting a new trial, unless it is manifest there has been an abuse of that discretion, either in violation of law, or the principles of equity, as regulated by law. *Simms vs. Southern Express Co*..... 129

Bills for a new trial, and to restrain a judgment at law, are not favored by Courts of Equity. In order to obtain the assistance of the Court in such cases, the complainant must shew *full diligence*, unmingled with negligence, on his part. *Robuck & Orr vs. Harbison et al*..... 174

The conduct of certain jurors who, while they were charged with the case, conversed with a person not on the jury, in presence of a number of others, about the case, and used expressions favorable to the right of the plaintiff to recover, assigning as a reason that defendant, sworn as a witness, had contradicted himself, when in fact he had not, is highly reprehensible, and a new trial should have been granted by the Court below on that account. Jurors should speak to no one, nor permit any one to speak to them about the case, while charged with its consideration. *Black et al. vs. Phillips*..... 216

There being, in this case, no evidence of the actual payment, by these heirs, of the widow's year's sup-

- port, we reverse the judgment of the Court below in refusing to grant a new trial. *Barron vs. Burney et al.*..... 264
7. The Court erred in not granting a new trial, upon the ground, that the verdict of the jury was strongly and decidedly against the weight of evidence, as to the mismanagement of the estate by the executors. *Wilson et al. vs. Whitfield et al.*..... 269
8. The evidence in this case having been fairly submitted to the jury, in accordance with the Ordinance, and there being sufficient evidence to support the verdict, and the presiding Judge being satisfied with it, this Court will not set it aside. *High vs. McHugh*..... 284
9. The bill of exceptions in this case was a general one, that the jury found contrary to law and evidence: *Held*, that there was not sufficient legal evidence to sustain the verdict. *Martin et al., vs. The State* 293
10. When a party did not enter an appeal within the time prescribed by law, and has otherwise been guilty of negligence, a new trial will not be granted on account of newly discovered evidence; more especially when the evidence is cumulative, and one of the witnesses, of whom the discovery is alleged to have been made, gave evidence on the trial, and the other was a clerk of the party moving for the new trial, at the time of the transaction, and the motion is not made more than twelve months after the rendition of judgment. *Miller vs. Mitchell, Reed & Co.*..... 312
11. Under the 6th section of the 11th article of the Constitution, motions for new trials, bills of review, or other proceeding, to vacate judgments, orders or decrees, made since the 19th of January, 1861, must be for *fraud*, illegality, or error of law. That section does not relieve one who was cast in his suit, or lost his rights by his own negligence. *Ibid.*
12. In suits upon Confederate contracts, where there has been no rule of law violated, nor manifest injustice done, this Court will not control the discretion of the Court below in refusing to grant a new trial. *Greene vs. Jones*..... 347
13. It was not error in the Court to refuse, on the facts of this case, the new trial asked for, nor was the charge

- of the Court, under the facts as they appear on the record, and the certificate of the Judge, sufficient ground for a new trial. *Dunnagan et al., vs. Dunnagan, et al.*..... 54
14. The evidence in this case was sufficient to maintain the verdict of the jury. *Jordan vs. The State..* 55
15. When a case was tried, and a verdict rendered in favor of the plaintiff, and a motion was made for a new trial, and the Judge who heard the case went out of office before the motion was disposed of, and no brief of the evidence was agreed upon by the parties, or approved and certified by the Judge to be correct: *Held*, that the Judge who succeeded to the bench committed no error in refusing to grant a new trial. *Reid & Brother vs. Spencer*..... 594
16. When the Court charged the jury that the case turned mainly upon *notice*, and the counsel did not ask the Court to charge upon the legal effect of rumors as *notice*: *Held*, that it is no sufficient reason for granting a new trial that the Court did not explain what amounted to *notice*, as applied to the facts in evidence, when no such request was made by the counsel, who now complain of the charge. *Street vs. Lynch*..... 631
- See *R.*, 49.

NOTICE.

- The fact that the consideration of a note is set forth on its face, does not carry with it notice of the failure of consideration, if it has failed, to a person taking it *bona fide*, nor is he *ipso facto* put upon inquiry, and bound to inquire whether the consideration has failed. *Bank of Commerce vs. Barrett, Carter & Co*..... 126
- See *Evidence*, 15.

NOTICE OF LIEN. See *Lien*, 3.

NOTICE TO PRODUCE PAPERS. *R.*, 47, 48.

NOTICE TO PURCHASER. See *Equity*, 6.

NOVATION.

1. The evidence that B was only a surety, and that C knew that A was to pay the debt, was sufficient to

sustain the finding of the jury, and the extension of the time of payment given by C to A, without the consent of B, the surety, released him. *Perry vs. Hodgett* 103

2. L., who owed S. \$1,000 00, for which S. held L.'s note and mortgage on a printing press, sold the press to C. for \$5,000 00, and C. agreed to pay the \$1,000 00 to S., and satisfy the note and mortgage, but S. refused to release L. and take C. for the debt. There was evidence before the jury, however, that S. agreed to take C. as collateral, and afterwards agreed to give C. time on the \$1,000 00, which he was to pay for L., if he would pay him two and a half *per cent.* per month for the indulgence, which he did for three or four months: *Held*, that it was error in the Court, in his charge to the jury, to restrict them to the single inquiry whether C. was substituted as the debtor in place of L. *Lochrane vs. Solomon*..... 286

3. If C. agreed to pay the debt of L. to S. in a short time, and S. having accepted the liability of C. as collateral, *afterwards*, for a valuable consideration, extended the time of payment for three or four months, as he had a right to do at his own risk, L. could not sue C. during that time, and S. was liable to L. for any damage sustained by L. on account of such indulgence given by S. to C. *Ibid.*

NUISANCE.

1. Since the organization of the County-Court, that Court, and not the Inferior Court, according to the provisions of Irwin's New Code, had jurisdiction to hear and determine the question of the abatement of a nuisance, caused by a mill-dam, on the 27th December, 1867. *Barrett, administrator, vs. Jackson et al.* 181
2. Any person who shall erect or continue, *after notice to abate*, any nuisance, which tends to annoy the community or injure the health of the citizens in general, or to corrupt the public morals, is liable to indictment under the Penal Code of this State. The legal offence of continuing a nuisance is not complete before notice to abate. And until the notice is given, and the legal offence is complete, the city authorities have power as a police regulation, to punish for the continuance of such nuisance, as would subject the offender to in-

dictment after notice to abate. But when the offence against the Penal Code is complete, they have only the power to bind over the offender to the proper court, to answer for the offence. *Vason vs. The City of Augusta*.....

A landlord who has leased premises to a tenant is not liable for a nuisance maintained upon the premises, by the tenant, during the lease. If the nuisance existed upon the premises when the lease was made, the landlord is liable. But if the tenant continues the nuisance after he obtains exclusive possession and control, he alone is liable for its continuance. As the landlord, under our statute, is liable for necessary repairs on the premises, if the nuisance grows out of his neglect to make the repairs, the tenant may make them, and set off their reasonable value against the rent due the landlord. *Ibid.*

NUNC PRO TUNC.

When a suggestion is, in fact, made of the death of a party, and entered on the Judge's docket, it is not error, even after judgment, to allow the entry to be made on the minutes, *nunc pro tunc*. *Pearce et al., vs. Bruce & Co*..... 444

ORDER OF ARGUMENT.

When, in an issue on the return of commissioners to lay off dower, the applicant opened the case by proof to sustain the return, and the contestant replied with proof attacking it, it is too late for the contestant to claim that he has a right to open and conclude the argument before the jury. *McKibbin vs. Folds*..... 235
see R. 13, and R. S. C. 6.

ORDER OF BUSINESS. R. 27, and R. S. C. 21.

ORDER OF EXAMINING WITNESSES.

See R. 60.

OFFICE PAPERS. R. 18 and 19, R. S. C. 24 and 25.

OPINIONS.

Of ~~pre~~me Court. See *Decisions of Supreme Court*.
See *Evidence*, 6, 12, 13.

ORDINANCE OF 1865.

~~S~~tealing Ordinance.
~~S~~ New Trials, 2, 8.

PARENT AND CHILD. See *Minors*.

PARI DELICTO. See *Damages*.

PAROL TESTIMONY. See *Evidence*, 14, 17.

PARTIES.

In equity all parties at interest must be made parties to a bill, if they be within the jurisdiction, and when a bill is filed against two partners, who are both served, and answer, (the bill praying an account for partnership acts,) and one of the partners dies: *Held*, that his personal representatives must be made parties to the bill, unless it affirmatively appears that he died non-resident, and that the estate has no interests in this State. *Pearce et al., vs. Bruce & Co.*..... 444

PARTIES—How made, *R.*, 14, and *R. S. C.*, 26.

PARTNERSHIP.

In this case the owners of a farm placed a farmer upon it, under contract to set-off the use of the farm against his skill and labor for five years, and the owners and tenant were to stock it on joint account, and divide the profits once a year, the owners to have the right to terminate the partnership on six months notice, if the farm failed to pay ten *per cent.* profit on the capital invested: *Held*, that the bill and answer shows that the farm has not paid ten *per cent.* to the owners on the capital advanced by them, and that the owners had a right, under the contract, to terminate the partnership by giving the six months notice, and that the Court did not err in granting an injunction, and appointing a Receiver to wind up the affairs of the partnership. *Nunn vs. McNaught, Ormond & Co.* 179
See *Lien*, 4.

PAWN. See *Pledge*.

PAYMENT.

If a creditor receive, in payment of his debt, a depreciated currency at its nominal value, without fraud or mistake, he will be bound by such payment. *Caruthers and wife vs. Corbin, executor, et al*

PAYMENT OF FI. FAS. See *R.*, 9.

PLEADING.

1. An affidavit filed to prevent an award from becoming the judgment of the Court, under the Code, it is not sufficient to state, in general terms, that the award is the result of accident, mistake or fraud, or is generally illegal; the affidavit must state such facts of fraud, accident or mistake, or designate such illegality as that the Court may see that a mistake, etc., did, if the statement be true, occur, and that it was material to the issue. *Schafer & Co. vs. Baker & Carswell*... 13
2. Where a contract was made between two attorneys, representing their clients, that, if the defendant would not *certiorari* the decision made by the County-Court establishing copies of certain lost notes, the defendant should have the right to file the plea of *non est factum*, when suit should be instituted on the established copy notes, and the defendant performed his part of the contract in good faith: *Held*, that, inasmuch as the plaintiff had the benefit of the contract on his part, it would be a *fraud* on the defendant not to require the plaintiff to perform his part of the contract, although the same was not in writing. *Henderson vs. Merritt*..... 23

See *Equity Pleading and Practice*.

" *R.* 12, 21, 22, 24, 28, and *E. R.* 2 and 4.

PLEDGE.

1. To constitute a pledge or pawn, under the Code, there must be a *deposit* of the thing pawned, and this can not be dispensed with by a written agreement, that the party making the pledge will be the bailee of the pawnee. *The First National Bank of Macon vs. Nelson & Co*..... 39

POSSESSORY WARRANTS.

When the possession of a watch had been awarded to a party by the judgment of a Judge, or Justice, under a possessory warrant, as provided by the 3959th section of the Code, and an action of trover is brought to recover the possession of the watch from such party having possession thereof, under such judgment: *Held*, that the plaintiff must prove a general property, or title in himself to the watch, to entitle him to recover the possession of it from the defendant. *Wallia et al., vs. Osteen*..... 250

PRACTICE.

1. A Justice of the Inferior Court, on the 26th day of October, 1867, had authority, under the law, to administer an oath for the removal of intruders upon land. *Collins vs. Rutherford et al*..... 29
2. The counter-affidavit of the party in possession must state that he does, in good faith, claim a *legal* right to the possession of the land. *Ibid*.
3. When the affidavit of the party in possession is dismissed for not being in compliance with the law, he will not be permitted to file a second affidavit at the Court, the Code requiring that he shall *at once* tender to the sheriff the proper affidavit. *Ibid*.
4. When a suggestion is, in fact, made of the death of a party, and entered on the Judge's docket, it is not error, even after judgment, to allow the entry to be made on the minutes, *nunc pro tunc*. *Pearce et al., vs. Bruce & Co*..... 444
5. It is too late after arraignment, and the case is before the jury, to object to an indictment on the ground that it fails to allege the residence of the defendant. *Long vs. The State*..... 491
6. Where the affidavit and counter-affidavit are filed in a proceeding to foreclose a mill-wright's lien on a mill, and the issue which is formed by the affidavit, is returned to the Court, and is pending on the appeal, and at the hearing the defendant is not present, and his counsel abandon his case, because their fees are not paid; the Court should require the plaintiff to make out his case, as in other cases in default, by *prima facie* proof of the justice of his

claim, before he is permitted to take judgment; and it is error to order that the defendant's affidavit be dismissed, and that the execution, which issued upon plaintiff's affidavit proceed. *McConnell vs. Bryant*... 639

See *Equity Pleading and Practice*.

PRACTICE IN SUPREME COURT.

A motion was made, which the Court agreed to consider in connection with the record, to dismiss this case, on the ground that the new Constitution of the State, adopted since the trial in the Court below, denies to the Courts of this State jurisdiction to enforce any contract, the consideration of which was a slave, it appearing from the record that the note in suit was given for slaves: *Held*, that the judgment which this Court pronounces upon the points made by the bill of exceptions, renders it unnecessary to decide the question raised by the motion. *Perry vs. Hodnett*..... 103

See *Bill of Exceptions*.

PREScription. See *Limitation of Actions*.

PRINCIPAL AND AGENT.

1. An Agent for the sale of goods cannot, as against the owner, pledge or mortgage them to a third party, to secure advances made on his own account. *The 1st Nat. Bank of Macon vs. Nelson and Co*..... 391
2. Service acknowledged by a general agent, without special authority, will be sufficient to protect the purchaser at sheriff's sale, in an action of ejectment, when the plaintiff in ejectment, who purchased from the mortgagor, after the date of the mortgage was in Court, when the rule absolute was taken, and made no objection. *Hightower vs. Williams et al*..... 597

PROCHIEN AMI. See *R. 50, and E. R. 6*.

PROMMISSORY NOTE.

1. A *bona fide* purchaser, for value of a negotiable promissory note before due, has a right to collect the amount thereof, notwithstanding the maker had been served with a summons of garnishment, requiring

- him to answer what he was indebted to the payee, who was the owner of it at the time of the service of the summons. In such a case the rights of the purchaser are paramount to those of the garnishing creditor. *Mimms et al., vs. West*..... 18
2. The doctrine of *lis pendens* does not apply to negotiable securities not due. *Ibid.*
3. The fact that the consideration of a note is set forth on its face does not carry with it notice of the failure of consideration, if it has failed, to a person taking it *bona fide*, nor is he *ipso facto* put upon inquiry, and bound to inquire whether the consideration has failed. *Bank of Commerce vs. Barrett, Carter & Co*..... 126
4. An indorsement of a promissory note past due, for a valuable consideration, is a new contract, and the Statute of Limitations begins to run in favor of the indorser only from the date of the indorsement. BROWN, C. J. *Brian, Ex'r, et al., vs. Banks*..... 300
5. Confederate currency paid and credited on a note for its nominal value, extinguished the note to the amount of that nominal value. *Green et al., vs. Jones et al*... 347
6. An obligation was given by J. Percy Green to Lowry, in February, 1865, for \$2,500 00 in Confederate Treasury notes, for the board of his three sisters, while he was absent in the army, when one dollar in gold was worth forty-six dollars in Confederate notes. On the 18th of November, 1865, before the Ordinance of the Convention for scaling Confederate contracts could have been well understood by the defendants, said Green, who was inexperienced, and his sister Julia, just of age, who boarded with Lowry and was under his protection till about the time it was given, executed a note, payable one day after date, for \$450 00, which was to be in lieu of the obligation of Green for the \$2,500 00 Confederate note, which the makers charge was given in that shape, on the fraudulent representations and false promises of Lowry, that they should have two or three years within which to pay it, and that he having taken advantage of their inexperience and of their ignorance of their legal rights, in obtaining the note brought suit on it in a short time: *Held*, that the Court erred in refusing to allow evidence tending to prove these facts, to go to the jury, and in ordering a

verdict for the plaintiff for the amount called for by the face of the note. *Green et al., vs. Lowry*..... 548

7. The note having been executed at a time when the parties did not know it was necessary to place a revenue stamp upon it; and on the fact being ascertained, said Green having voluntarily placed the necessary stamp on the note, and again delivered it to the payee, whereby the government received the revenue to which it was entitled, Green will not be allowed to controvert the fact that the note was legally stamped. *Ibid.*

PUBLIC ENEMY. See *Common-Carriers*, 1.

PURCHASER WITH NOTICE. See *Equity*, 6.

RAILROAD COMPANIES.

1. When two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the carelessness, or negligence of the other, the Court will not lend its assistance in favor of either party to recover damages. The maxim of the law in all such cases is, "*In pari delicto potior est conditio defendentis et possidentis.*" *Wallace, Sup't. vs. Cannon*..... 199
2. By the provisions of the 3329th section of the Code, railroad companies are liable to be sued for injuries done to persons, or property, by the running of "hand-cars" upon their roads, as well as by the running of cars propelled by steam-power, and may be sued therefor, in any county in which the cause of action originated. *Thomas vs. The Georgia R. R. and Banking Co.*..... 222
3. If a passenger on a railroad be injured by a collision of the trains, and the evidence shows that, though the company (or its agents), was guilty of negligence, yet the party injured could, by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the Company. *M. & W. R. R. Co. vs. Johnson*..... 409
4. If, in such a case, it appears that both the defendant and the plaintiff were guilty of negligence, and it does not further appear, from the evidence, that the

deceased could, at the time of the injury, have avoided the consequence to himself of the negligence of the railroad company, or its agents, he is entitled to recover; but it is the duty of the jury to lessen the amount of their verdict in proportion to the negligence and want of ordinary care of the passenger. *Ibid.*

5. Where a suit is brought by a widow, for the homicide of her husband, under the 2920th section of Irwin's Code, and there is no fault proven on the part of the deceased, the rule to be adopted for estimating the damages is: The pecuniary damages to the wife from the homicide, to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation and prospects in life, and when the annual money value of that support has been found, to give, as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well established reputation. *Ibid.*
6. The opinion of one, who, for many years, has been a railroad superintendent, in a matter within the scope of his employment, stands upon the footing of the opinion of an expert; but he cannot give his opinions of the object of a railroad company, with which he had no connection, in putting up a particular notice on the door of its cars. Though opinions are not generally evidence, yet, when the truth sought to be ascertained is matter of opinion, a witness, not an expert, may give his opinion, if he states the facts upon which it is based. *Ibid.*
7. Railroad companies may make reasonable rules for the conduct of their passengers, and a rule that passengers must not stand upon the platform of the cars, is such a reasonable regulation. *Ibid.*
8. If such a notice be proven to have been posted in large metal letters, upon the doors of the passenger cars of a railroad company, a passenger will be presumed to know the rules, and if that knowledge be denied, the burden of establishing such want of knowledge is upon the party denying it. *Ibid.*
9. In this case, this Court feels constrained to reverse

PAWN. See *Pledge*.

PAYMENT.

If a creditor receive, in payment of his debt, a depreciated currency at its nominal value, without fraud or mistake, he will be bound by such payment. *Caruthers and wife vs. Corbin, executor, et al* 75

PAYMENT OF FI. FAS. See *R.*, 9.

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" *R.* 12, 21, 22, 24, 28, and *E. R.* 2 and 4.

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REFORMATION OF DEEDS.

1. In a proceeding to reform a deed, on the grounds of fraud and mistake, the declarations of the grantor, made subsequent to the execution of the deed, and in the absence of the grantee, are not admissible to prove a mistake in the deed, which may be corrected in Equity. *Adair, Adm'r., vs Adair, Ex'r., et al.*..... 46
2. Before an instrument can be reformed, it must be shown, by clear and satisfactory evidence, that either by accident, fraud, or mistake, the written instrument does not contain and express what the parties intended it should contain and express at the time of its execution. (R.) *Ibid.*

RELIEF LAWS. See *Constitutional Laws.*

REMITTITUR. See *R. S. C. 27.*

REPORTER S. C. *R. S. C. 12, 13, 14.*

RES GESTÆ.

- A card published by the passengers immediately after a railroad collision, is not evidence, as part of the *res gestæ*. *M. & W. R. R. Co. vs. Johnson*..... 409

RETRO-ACTIVE LAWS.

1. The Act of the Legislature of 1861, and the Ordinance of the Convention of 1865, *suspending* the running of the Statute of Limitations in this State. are recognized, and made valid by the *express* provisions of the Constitution of 1868. *Brian, Ex'r, et al., vs. Banks*..... 300
2. The Statute of Limitations was legally suspended for one year by the Act of December, 1860. *Brown, C. J. Ibid.*
3. The Ordinance of the Convention, passed 1st November, 1865, declaring the Statute of Limitations, in all cases, civil and criminal, *to be and to have been* suspended from the 19th of January, 1861, and that it shall so continue until civil government is fully restored, or until the Legislature shall otherwise direct, has been legalized by the new Constitution, and the Ordinance of the Convention of 1868, so far

as it does not divest vested rights. This made it valid, so far as it was prospective, but whether it could restore to plaintiff a right of action lost by the running of the statute for the *full period* prescribed by law before it passed, *quere*. BROWN, C. J. *Ibid*.

4. Real estate in the town of Monticello, was sold at sheriff's sale, as the property of an insolvent debtor: *Held*, that the wife of the defendant in *fi. fa.*, is entitled, under the 2013 and 2017 sections of the Code, to have \$500 00 of the proceeds of the sale, set apart and invested in a home for herself and family, against a pre-existing creditor. *Maxey, Jordan & Co., vs. Loyal et al.*..... 531
5. When land was sold under a judgment obtained in 1861, the wife could claim no more of the proceeds as exempt from payment of her husband's debts than was *then* exempt by law. WARNER, J., dissenting. *Ibid*.
6. The penalty for the crime of burglary was changed by the Legislature between the commission of the crime by the defendant in this case and the time of his trial: *Held*, under section 4570 of the Revised Code, that the defendant was properly prosecuted and punished under the laws of force at the time the crime was committed. *Jordan vs. The State*..... 585

REVENUE OF THE STATE.

See *Western and Atlantic Railroad*.

REVENUE STAMPS.

The note having been executed at a time when the parties did not know it was necessary to place a revenue stamp upon it, and on the fact being ascertained, said Green having voluntarily placed the necessary stamp on the note, and again delivered it to the payee, whereby the government received the revenue to which it was entitled, Green will not be allowed to controvert the fact that the note was legally stamped. *Green vs. Lowry*..... 548

SALES CONDITIONAL. See *Contracts*, 1.

SALES BY EXECUTORS.

Where the testator directed that all his property be kept together during the widowhood of his wife, to be used for the support and maintenance of his wife and the education of their minor children, and that his executors give off to each of his minor sons, as they might come of age, and to his daughters, as they might come of age or marry, about \$3,100 00 or \$3,200 00 in money or property, as may be most convenient to the estate, and most suitable to the party receiving property; and in order to enable his executors the more conveniently to carry out the foregoing objects, he thereby gave them power to sell any of the property and to *buy* or to *exchange* for other property, taking care to give a full statement and history of all such sales, purchases and exchanges, to the Court of Ordinary: *Held*, that it was the intention of the testator to give the executor power to sell at private sale, and that such sale by him, if fairly and honestly made, conveyed a good title to the purchaser. *Mattox vs. Eberhart, administrator*..... 581

SALES BY SHERIFFS.

1. When an attachment is levied on real estate, and, before judgment on the attachment, an execution on a common law judgment, in favor of other parties, against the defendant is levied on said real estate, the sheriff may sell under the last levy and the purchaser gets a good title. *Kilgo vs. Castleberry*..... 512
2. When an execution against two joint obligors is levied upon the property of one of them, the other defendant has a right to buy the property at the sale, and he gets the full title of his co-defendant to the property. *Ibid.*
3. A purchaser at sheriff's sale, under a mortgage *fi. fa.*, will be protected when the rule absolute shows upon its face, that the rule *nisi* was served upon the mortgagor according to law. *Hightower vs. Williams*..... 597
4. Service, in such case, acknowledged by a general agent, without special authority, will be sufficient to protect the purchaser at sheriff's sale, in an action of ejectment, when the plaintiff in ejectment, who purchased from the mortgagor after the date of the mort-

gage, was in Court when the rule absolute was taken, and made no objection. *Ibid.*

SAYINGS OF PARTY. See *Evidence*, 10.

SCALING ORDINANCE OF 1865.

1. Under the Scaling Ordinance of 1865, the parties to contracts made between 1st June, 1861, and 1st June, 1865, have the right to give in evidence to the jury the consideration of the contract, and the value thereof, *at any time* and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency *at any time*, and the verdict and judgment rendered shall be on principles of equity. *High vs. McHugh*..... 284
2. The evidence in this case having been fairly submitted to the jury, in accordance with the Ordinance, and and there being sufficient evidence to support the verdict, and the presiding Judge being satisfied with it, the Court will not set it aside. *Ibid.*

SET-OFF.

In a proceeding to foreclose a mortgage on a note for money lent, the defendant can not set up a claim against the plaintiff for damages growing out of a partnership which existed between them in the saw-mill business, either by set-off or recoupment, though part of the money which defendant borrowed of plaintiff was used in the purchase of mules, wagons and provisions, which defendant was to furnish in carrying out his part of the contract of partnership. *Taylor vs. Hardin*..... 577

See *Recoupment*.

“ *R.*, 12.

SHERIFF.

While the statute, known as the Stay-law, was considered of force, the plaintiffs in *fi. fa.* notified the sheriff that the judgment was recovered against the defendant as a bailee, which was one of the excepted cases in the statute, to which it did not apply, and directed him to proceed to make the money by levy. He refused to do so, and, in response to a rule, claimed that

he was not bound to levy under the notice, because the *fi. fa.* did not show on its face that the case was within the exception. This was not a legal excuse. He should have made the levy under the notice, and left the defendant to his affidavit of illegality, or other proper remedy, if the facts were not as stated in the notice, and having failed to proceed with the *fi. fa.*, he is liable. *Pinney & Johnson vs. Levy*..... 14

A deputy sheriff is liable to rule for failing or refusing to pay over money collected by him. But he is subject to the control of the sheriff, and if he collects money on a *fi. fa.*, and pays it over to the sheriff, whose deputy he is, he is not liable to rule at the instance of the plaintiff in *fi. fa.*, after such payment. In such case the plaintiff must pursue his remedies against the sheriff. *Varner vs. Wootten*..... 57

After a Court of Equity has taken the control of the case, the Court of Common Law will not entertain a rule against the sheriff to compel him to place A, or his vendee, C, in possession of the premises in dispute on account of a defect in the original counter-affidavit filed by it. *Wyley vs. Whiteley, et al.*..... 60

See R., 52, 54, inclusive.

“ *Sales of Sheriffs.*

SLAVERY. See *Emancipation.*

STAMPS. See *Revenue Stamps.*

STATUTE OF LIMITATIONS.

See *Limitation of Actions.*

SUPERSEDEAS.

When the Chancellor, on the bill being presented to him, ordered that the defendants show cause on a day mentioned, why an injunction should not be granted, and that *in the meantime* the defendants be enjoined, till the further order of the Court, and on the hearing, the Judge refused the injunctions: *Held*, that the temporary injunction expired of its own limitation when the injunction was refused at the hearing, and that no vitality could be given to it pending the proceeding in this Court, by bond given by complainant,

which is claimed to operate as a *supersedeas* of the judgment refusing the injunction. *Powell vs. Parker et al.*..... 644

SUPPORT OF INFANTS. See *Minors*.

SURVEYS. See *R.*, 55, 59 *inclusive*.

TENANTS-IN-COMMON.

John Waters died testate, leaving three daughters. By the *eleventh* item of his will he directed that the residue of his estate, after the payment of debts, and for certain improvements, be invested in bank stock, and that his executors hold it in trust for the equal use and benefit of his daughters aforesaid, during their respective lives, and after their death, then in trust for the use of the children of said daughters, and if either of his said daughters died without issue, her share to go to her sisters, and if either died leaving issue, her share to go to her issue. One of the daughters died without issue. Another died leaving one child, the wife of plaintiff in error; the third is still in life: *Held*, that the three daughters were tenants-in-common under this item of the will, and that the two survivors took the share of the sister who died without issue, equally, in fee simple, and upon the death of the second sister, her daughter took her share in like manner, and became a tenant-in-common with the surviving daughter of the testator. *Dunn et al., vs. Bryan.* 154

See *Landlord and Tenant*.

TIME.

For Exceptions and Objections: *R.*, 1, 15, 28, 37, 44, 59.
 For Requests to Charge: *R.*, 5.
 For Filing Bill of Particulars: *R.*, 12.
 For Joining Issue in Claim Cases: *R.*, 15.
 For Announcing Ready: *R.*, 22.
 For Return of Commissions: *R.*, 34.
 For Return of Justices of the Peace: *R.*, 40.
 For Striking Juries: *R.*, 41.
 For Objection to Surveys: *R.*, 59.
 For Filing Injunction Bill: *E. R.*, 1.
 For Docketing Cases in Supreme Court, 19.
 For Making Parties " " 26.
 Allowed Counsel in Supreme Court: *R. S. C.*, 5.

TORTS.

See *Emancipation*, 5.

“ *Waiver*, 3.

TRESPASS. See *Injunction*, 4.

TROVER.

When the possession of a watch had been awarded to a party by the judgment of a Judge, or Justice, under a possessory warrant, as provided by the 3959th section of the Code, and an action of trover is brought to recover the possession of the watch from such party having possession thereof, under such judgment: *Held*, that the plaintiff must prove a general property, or title in himself to the watch, to entitle him to recover the possession of it from the defendant. *Wallis et al., vs. Osteen*..... 2

TRUSTEES.

1. A trustee in possession of trust property is only bound, under our Code, for ordinary dilligence in its preservation and protection. *Campbell vs. Miller et al...* 3
2. And a trustee in possession of promissory notes as trust property, may receive payment of said notes in such currency as a prudent man, under the like circumstances, would receive in payment of debts due him individually. *Ibid.*
3. A trustee who, during the war, in good faith, received Confederate treasury notes, in payment of promissory notes held by him in trust, acted under color of law, and is protected by the Act of 1866 and the Ordinances of the Conventions of 1865 and 1868. *Ibid.*
4. If the trustee received Confederate currency before the adoption of the Code, and after its adoption invested it in securities not authorized by law, and without an order of Court, he did so at his own risk, and is liable for the value of such currency at the time when it is said to have been re-invested. *Ibid.*
5. If the trustee changes the investment, with the consent of the *cestui que trust*, who is of legal age, he is not liable for any loss growing out of such new investment. *Ibid.*

6. It was competent to show that the investment, or changes of investment, were prudent. *Ibid.*
7. Where A. is the owner of two promissory notes, due at different times, and of a mortgage on real estate securing them, and transfers one of the notes to B., entering, at the time, into a written contract that he, in a specified time, would transfer to B. and his assigns, the mortgage to secure the note, and B. transfers the note and agreement, the note still being not due, to C., and A. afterwards refuses to transfer to C. the mortgage, except upon conditions, which C. is not bound to accept: *Held*, that though A. still had the legal title to the mortgage, he held it for C.'s use, and, if by the use of that mortgage, he collects, out of the property mortgaged, money sufficient to discharge C.'s note, C. may recover the same from A. *Roberts vs. Mansfield*..... 452

VARIANCE. See *Criminal Law*, 7.

WAIVER.

1. If the complainant, in a bill of equity, intends to waive the answer of the defendant under oath, he must state so distinctly. The statement that he is *able* to prove the allegations in his bill, without the answer of the defendant, is not a compliance with the Code. *Woodward vs. Gates*..... 205
2. If complainant waives an answer under oath, the answer filed is not evidence. It may be used, however, as an admission of record, and complainant is not bound to prove any fact admitted. But when so used, the admission must be taken, together with any qualifications or explanations accompanying it. *Ibid.*
3. The plaintiff in this case waives the tort committed by the defendants in forcibly taking the cotton from his gin house, by the form of action brought, and can only proceed for the price of the cotton. *Blalock et al., vs. Phillips*..... 216

WASTE.

1. In an action for waste, a witness should state facts, and while he may give his opinion, accompanied by the facts upon which it is predicated, as to the num-

ber of acres from which the timber has been cut, the value of the land before and after it was cut, the whole number of acres in the tract, the proportions of timbered land, and the like; it is error in the Court to permit him to give in evidence his opinion that the estate of the remainder-man has been damaged a certain amount by the defendant. It is the province of the jury to draw, from the facts stated, their own conclusion as to the amount of damage, if any, sustained by the plaintiff. *Woodward vs. Gates.* 20

2. The Statute of Gloucester, as to the forfeiture, was not of force in Georgia prior to the adoption of the Code, and it was error in the Court to instruct the jury that they might find a forfeiture of the life-estate upon evidence of acts, most, if not all, of which were done prior to that date. The evidence upon which the forfeiture was claimed should have been confined to acts of waste since 1st January, 1863. *Ibid.*
3. The stringent rules of the English law relative to waste, were not applicable to our condition and were not embraced in our adopting statute. It is not always waste in this State for a tenant-for-life to cut growing timber, or clear land. Regard must be had to the condition of the premises; and the proper question for the jury to decide, under the instruction of the Court, will be, did good husbandry require the felling of the trees, and were the acts such as a judicious, prudent owner of the inheritance would have committed? *Ibid.*

WESTERN AND ATLANTIC RAILROAD.

The Western and Atlantic Railroad is the property of the State, and its incomes are part of the revenue of the State. A debt due the road is a debt due the public, and is to be paid before "any other debt, lien or claim whatsoever," except funeral expenses, etc., as specified by the Code. *The State vs. Dickson*..... 17

WIDOW.

1. Two parties rented a store-house for one year, from 24th November, 1867, the rent to be paid quarterly, and soon after dissolved the partnership, and one of them continued the business on his own account for a

time and died. His administrator obtained an order from the Court of Ordinary, authorizing him to continue the business for the balance of the year, for the benefit of the estate. The widow applied for the year's support, allowed by law for herself and children, and the appraisers allowed her \$2,700, which was made the judgment of the Court of Ordinary, and which left the estate insolvent. The other partner was also insolvent. The landlord filed a bill, praying an injunction against the administrator, to restrain him from turning over the estate to the widow, or otherwise disposing of the same till his note was paid: *Held*, that the dissolution of the firm did not affect the rights of the landlord, as a tenant can not, under our statute, transfer his lease without the consent of the landlord; and the lease, so far as the landlord's rights were concerned, remained partnership property, and forms no part of the estate of the deceased partner till the rent is paid, and that the landlord is entitled to his rent out of the proceeds of the business done in the house, or the stock in trade, for the time the administrator used the premises, before the estate is turned over to the widow of the deceased. *Boone vs. Sirrine, Adm'r*..... 121

2. Although, under the Code, executors *de son tort* can not get credit for any debt they may have paid; yet, if, in good faith, they have furnished the widow her year's support, according to her circumstances in life, and this has exhausted the effects they have used, they are not liable, except for the excess. The claim of the widow is not a debt, but a special provision allowed by law, in preference to any liens or debts held by creditors. *Barron vs. Burney et al*..... 264
3. Where a suit is brought by a widow, for the homicide of her husband, under the 2920th section of Irwin's Code, and there is no fault proven on the part of the deceased, the rule to be adopted for estimating the damages, is: The pecuniary damages to the wife from the homicide, to be ascertained by inquiring what would be a reasonable support, according to the circumstances in life of the husband, as they existed at his death, and as they may be reasonably expected to exist in view of his character, habits, occupation, and prospects in life, and when the annual money value of that support has been found, to give,

as damages, its present worth, according to the expectation of the life of the deceased, as ascertained by the mortuary tables of well established reputation.
M. & W. R. R. Co. vs. Johnson..... 40

WILL.

1. By the laws of South Carolina, as they existed in 1835, a will practically emancipating slaves was invalid, so far as such object was concerned ; but other bequests, in the same will, were not affected thereby. *Caruthers and Wife vs. Corbin, Ex'r, et. al*..... 7
2. Our laws will not enforce the provisions of a will made in another State, which are directly contrary to the declared policy of this State; but the judgment of a competent tribunal as to such will, where the will was executed, will be respected by the Courts of this State. *Ibid.*
3. John Waters died testate, leaving three daughters. By the *eleventh* item of his will he directed that the residue of his estate, after the payment of debts, and for certain improvements, be invested in bank stock, and that his executors hold it in trust for the equal use and benefit of his daughters aforesaid, during their respective lives, and after their death, then in trust for the use of the children of his said daughters, and if either of his said daughters died without issue, her share to go to her sisters, and if either died leaving issue, her share to go to her issue. One of the daughters died without issue. Another died leaving one child, the wife of plaintiff in error; the third is still in life: *Held*, that the three daughters were tenants-in-common under this item of the will, and that the two survivors took the share of the sister who died without issue, equally, in fee simple, and upon the death of the second sister, her daughter took her share in like manner, and became a tenant-in-common with the surviving daughter of the testator. *Dunn et al., vs. Bryan*..... 15.
4. By the third item of the will of A. V., he gave to his wife, during her widowhood, certain negroes and other personal property, and about five hundred and twenty acres of land, known as his "Home place." In case of her marriage, the negroes were to be divided into three lots, she to take one and his two youngest

sons each one share, and his said two youngest sons to take the balance of the property in said third item, including the "Home place," which was to be held by their guardians till they were of age. Testator afterwards sold the "Home place" to K. for \$10,000, and took notes, and gave bond for titles. After this sale, he added a codicil to his will, in which he expressed his purpose to give direction to a "certain fund that he shall have," and recited the fact of the sale of the "Home place" for \$10,000, and directed that "said sum of money" be invested by his executors in a plantation for the use of his wife during her widowhood, and if she should marry again, said plantation to go to his two youngest sons as set forth in the third and fourth items of his will. He afterwards collected \$2,500 of the purchase-money, which he used, and soon after died. The balance of the purchase-money has never been paid, the title to the "Home place" remains in the estate, and K, the purchaser, is insolvent: *Held*, that there was an ademption of the specific legacy to the extent of the \$2,500 collected and used by the testator before his death, and as there is nothing for the codicil to act upon till the purchase-money due at his death (which is the "certain fund" that was the object of it), is collected, the codicil, made under a mistake, did not revoke the will, as to the "Home place;" and that the widow and two youngest sons take it, under the third item of the will. But should the purchaser, at a future time, pay the balance of the purchase money and interest, and compel a conveyance of the land, the codicil will then attach to the fund, when so paid in, and it will be the duty of the executors to invest it in a plantation for the widow and children as directed in said codicil. *Whitlock et al., Ex'rs., vs. Vaun.....* 562

5. When a testator, who died in 1853, by will, directed that his executors cause to be removed to a free State, and there emancipated, his negro boy John, and that the executors pay the expenses of his removal and for his reasonable support and schooling, until he is put to a trade, and when, if he do, he reaches the age of twenty-one years, they invest and secure for his benefit, as they may deem best, the sum of three thousand dollars to be paid out of the estate: *Held*, that such devise constituted a legal trust, which neither contra-

vened the policy of the State at that time nor the present time. *Green, Ex'r., vs. Anderson*..... 6

WITNESS.

1. A. and B. made and delivered to C. their joint and several promissory note, due twelve months after date. C. afterwards, for a valuable consideration, agreed with A., without the consent of B., to extend the time of payment twelve months longer. C. endorsed and delivered the note to D. after it was due, with notice of the extension of the time of payment. D., after said time expired, sued A. and B., as makers, and C., as endorser, and obtained judgment. B., who was then absent in the military service, returned, after the rendition of judgment, and entered an appeal within the time allowed by the Ordinance of the Convention of 1865, and set up the defence that he was only a surety for A., and had no interest in the consideration of the note. A., who had entered no appeal, died before the trial, and was not a party to the "issue on trial:" *Held*, that on the trial of the issue between D. as plaintiff, and B. as defendant, B. was a competent witness under our statute, to prove that he was only a surety to the note. In a suit by A.'s representative, after payment out of A.'s estate, against B. for contribution, A. and B., who were parties on the same side of the original contract, would be opposing parties to the issue on trial, and B. would be an incompetent witness. *Perry vs. Hodnet* 1
2. A witness for the State, in a criminal case, who, in obedience to a *subpœna* served upon him while temporarily in this State, actually comes from his home, in a distant State, where he resided when the *subpœna* was served upon him, and testifies in the cause, is entitled to mileage from the county treasury, for the whole distance travelled in coming from and returning to his home. *Dutcher vs. J. J. Fulton Co.*.... 2

WITNESSES—HOW EXAMINED. R. 60.

YEAR'S SUPPORT. See *Landlord and Tenant*.



